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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, FOR LEAVE TO APPEAR AS AMICUS CURIAE, OR TO INTERVENE AS PARTY, AND TO DISMISS FOR WANT OF JURISDICTION.

STATEMENT OF MATTER AND GROUNDS MAKING AGAINST THE JURISDICTION ASSERTED BY APPELLANTS.

J. SCOTT MATTHEWS,
Counsel for Clayton F. Smith, Recorder of Deeds and ex officio Registrar of Titles of Cook County, Illinois.

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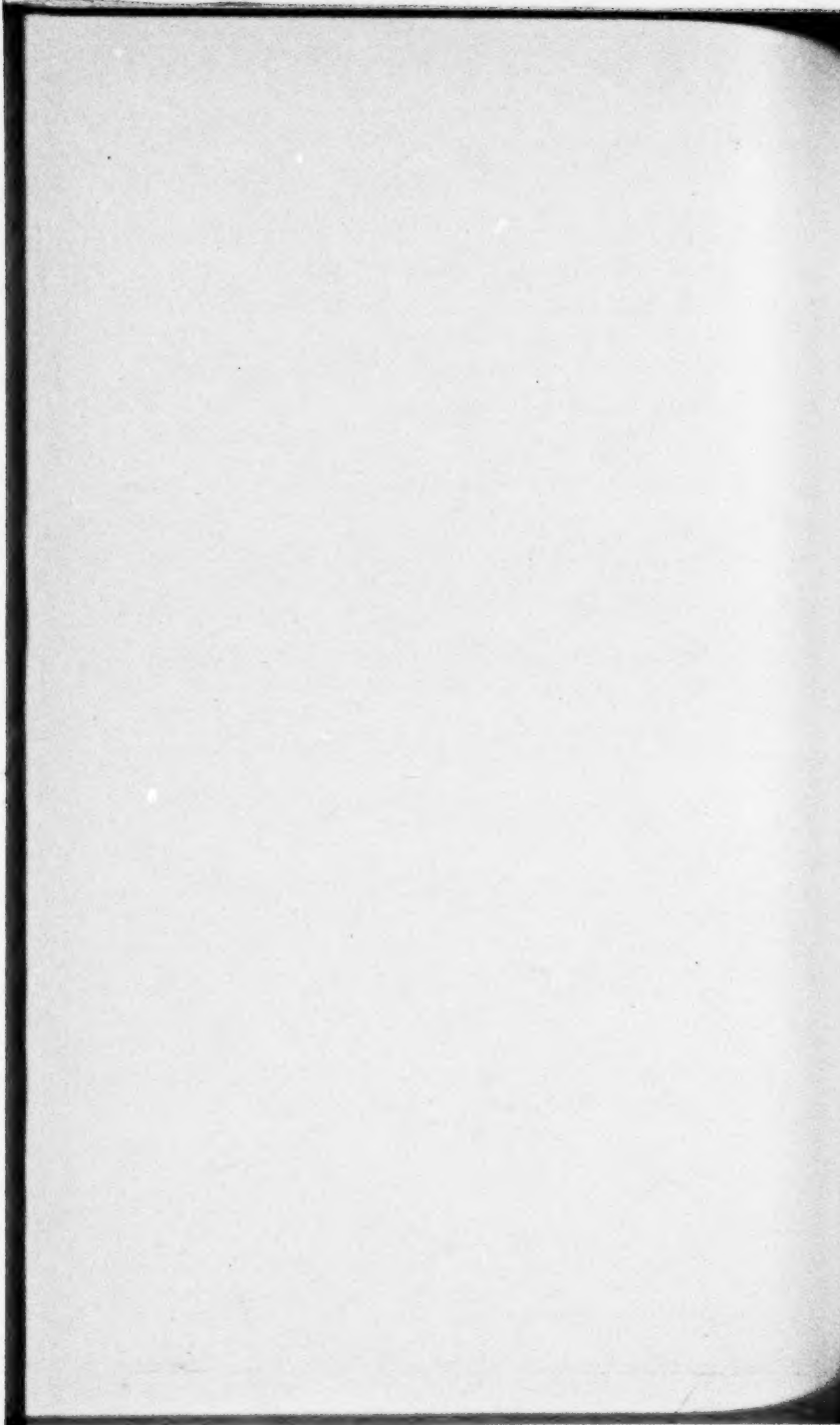

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MOTION.

And now comes Clayton F. Smith, Recorder of Deeds and *ex-officio* Registrar of Titles of Cook County, Illinois, by J. Scott Matthews, his attorney and counsel and moves the court.

(a) For leave to appear as *amicus curiae* in the above entitled cause, and to file statements and briefs as such, or

(b) In the event that said motion for leave to appear as *amicus curiae* is denied, for leave to enter his appearance as a party defendant in the above entitled cause, and

(c) In the event of the allowance of either motion to appear as *amicus curiae*, or as party defendant, the registrar of titles of Cook County, Illinois, moves that the appeal of appellants from the Supreme Court of the State of Illinois in the above entitled cause be dismissed at appellants' costs for want of jurisdiction.

In support of which motion the Registrar of Titles of Cook County, Illinois, presents the suggestions attached hereto and a statement of matter and grounds making against the jurisdiction asserted by appellants.

CLAYTON F. SMITH,
Recorder of Deeds and Ex-Officio Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.

SUGGESTIONS IN SUPPORT OF MOTION.

1. This case arose on a supplemental petition filed in the Circuit Court of Cook County, Illinois, in an original land title registration proceeding under Sections 93 and 94 of "An Act Concerning land titles," in force May 1, 1897, in the State of Illinois, which act is commonly known as the Torrens Act. The purpose of the petition was to cancel two certificates of title issued by the Registrar of Titles of Cook County, Illinois, and two deeds filed with the Registrar of Titles. Charles Wilborn, Carrie S. Wilborn and Noel State Bank, appellees, were defendants to such petition, as was the then Registrar of Titles of Cook County, Illinois. Charles Wilborn, Carrie S. Wilborn and Noel State Bank filed demurrers to said petition which were sustained by the trial court and by the Supreme Court of Illinois on appeal. The Registrar of Titles of Cook County, Illinois, against whom the primary relief of cancelling the deeds and certificates of title was sought was never served with summons and is not a party to the proceeding.

2. On October 2, 1929, the following letter signed by the attorneys of record for appellees, Charles Wilborn, Carrie S. Wilborn and Noel State Bank, which bears date September 25, 1929, but was not delivered until October 2, 1929, was delivered personally at the office of the Registrar of Titles:

"Joseph G. Sheldon
Attorney at Law
Suite 1002-1004 Association Bldg.
1[illegible] South La Salle Street
Tel. Randolph 4861

Chicago, September 25, 1929.

Mr. Clayton F. Smith, Recorder of Deeds,
Registrar of Titles,
County Building, Chicago, Illinois.

My Dear Sir:

You have probably been advised by your attorney that at the June term 1929 of the Supreme Court an opinion was handed down in the case of *Eliason* v. *Wilborn,* which is of tremendous importance to the Torrens Office. The court held in that case that under the provisions of Section 42 of the Torrens Act a certificate issued on a forged deed conveys a good title where the premises, after the forged deed has been accepted by the Registrar and a new certificate issued, are conveyed to a purchaser for value without notice, who accepts them on the strength of the new certificate and has no knowledge or notice of the fraud committed, and that in such a case the only remedy of the original owner, whose name was forged and who has thus lost his property, is against the indemnity fund.

The unsuccessful appellants in that case have now perfected an appeal from that decision to the Supreme Court of the United States on the ground that this Section 42 of the Torrens Act, as construed by our Supreme Court in that case, is repugnant to the Fourteenth Amendment to the Constitution of the United States in that the appellants were deprived of their property without due process of law. In that appeal various documents have been served on us as attorneys for the appellees, Charles Wilborn, Carrie S. Wilborn and Noel State Bank.

We have discussed with our clients the question of the advisability of their following this appeal to the Supreme Court, and they have finally decided not to do so, but to permit the United States Supreme Court to wrestle with this question as best it can without the aid or assistance of any attorneys retained and compensated by them. The reason for this decision on their part is that to them the question of the constitutionality of this section of the Torrens Act is of no particular importance as a matter of dollars and cents. They have already spent and become obligated for considerable amounts of money in defending in the trial court and in our Supreme Court the litigation instituted by Eliason, and they do not desire to incur any further expense. If the United States Supreme Court reverses the decision of our Supreme Court and decides that Section 42 of the Torrens Act, as construed by our Supreme Court, with reference to a title derived under a forged deed, is null and void because it is repugnant to the Federal construction, our clients still have their right to a defense against the petition of the complainants on the facts. From what they tell me, it is very likely that upon such a hearing they will be successful in defeating the petition of the appellants, even though the United States Supreme Court should hold that our Supreme Court erred in its decision.

Furthermore, even though our clients should be unsuccessful upon a hearing on the facts of the appellants' petition, and the certificate issued to them be held invalid and ordered cancelled, there can be no question but that they would have a right to file a claim against the indemnity fund for the loss sustained by them in purchasing this property on the strength of the certificate which was later so declared invalid and void.

When you take all these matters into consideration, you will readily see that to them the question of the constitutionality of Section 42 of the Torrens Act is of no particular importance, in other words, nothing but an academic question, and there is no reason why they should spend any further money defending the appeal to the United States Supreme Court.

However, the question of the construction of that Section and the constitutionality of it is undoubtedly

a very important question to the people at large, and especially to those who own property registered under the Torrens Act. For that reason we have obtained our clients' consent to permit you, if you so desire, to engage your attorney either to represent our clients in the litigation in the United States Supreme Court, or if you prefer, to have him file a petition in that court for leave to appear as *amicus curiae* and file a brief and argument as such.

Naturally, this permission is given only on the condition that there will be no expense whatever to our clients connected with such appearance, either in the way of attorney's fees or printing bills, stenographer's fees, traveling or other expenses.

Trusting to hear from you at your earliest convenience in reply to this letter, we remain,

Yours very truly,

CHARLES F. GLAESER,
JOSEPH G. SHELDON."

From the foregoing letter, the original of which the Registrar of Titles is ready to produce in open court, it appears that Charles Wilborn, Carrie S. Wilborn and Noel State Bank, appellees, will not appear in the Supreme Court of the United States, and that unless the Registrar of Titles of Cook County, Illinois, is allowed to appear as *amicus curiae*, or to intervene as a party defendant, there will be no argument or brief on behalf of the appellees and only the appellants' side of this case will be presented to this honorable court.

Over 20 per cent of the property in Cook County, valued at more than one billion dollars, is registered under the Torrens system. The aggregate annual dealings in the Torrens office at Chicago are over two hundred and fifty millions of dollars. The importance of any case which involves the question as to whether an innocent purchaser for value can rely upon a Torrens certificate of title cannot be over-

estimated, and this honorable court is entitled to the fullest arguments in favor of the Torrens system when it is attacked in this court.

The Registrar of Titles of Cook County cannot undertake the defense of a private individual, or provide counsel for a private individual, because he has no funds available for that purpose. Although he is the primary defendant in this suit, he was not served. The reason why he did not appear in the Illinois courts in the suit was that the case went up on demurrer between private individuals, and the Registrar of Titles did not desire to have it appear even impliedly by demurrer, that the deed which was attacked is a forgery, since the Registrar of Titles believes that he can prove that the deed was genuine, although the means of obtaining it may have been an imposition upon the appellants by a third party. It is for the same reason that the Registrar of Titles prefers to ask permission to appear as *amicus curiae* in this court, rather than as a party defendant. But if this honorable court does not desire to have the Registrar of Titles appear as *amicus curiae,* then the Registrar of Titles respectfully asks that he may be allowed to appear as a party defendant, because he believes that it would be to the best interests of the multitude of holders of Torrens certificates in Chicago to have him admit the facts pleaded for the sake of argument and to have the Torrens side properly presented to this court, rather than not to have it presented at all.

The Registrar of Titles of Cook County, Illinois, therefore respectfully prays that he may be allowed to appear in this cause either as *amicus curiae,* or as a party defendant, as this honorable court may deem best.

The Registrar of Titles has also moved that this case be dismissed at appellants' costs for want of jurisdiction for the reasons set out in his statement of matter and grounds

making against the jurisdiction of this honorable court asserted by appellants. In view of the short time intervening before this honorable court meets and the motion is presented, the Registrar of Titles has confined himself strictly to the question of jurisdiction. If this honorable court should find that it has jurisdiction, then the Registrar of Titles of Cook County, Illinois, respectfully requests that he be given an opportunity to present a full and complete argument of this case from a Torrens standpoint.

Respectfully submitted,

CLAYTON F. SMITH,
Recorder of Deeds and ex-officio Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.

STATEMENT OF MATTER AND GROUNDS MAKING AGAINST THE JURISDICTION OF THIS HONORABLE COURT ASSERTED BY APPELLANTS.

MAY IT PLEASE THE COURT:

The Registrar of Titles of Cook County, Illinois, herewith respectfully presents the following matter and grounds making against the jurisdiction of this honorable court in this case asserted by appellants:

A.

NATURE OF CASE AND RULING BELOW.

Section 110 of the Illinois Torrens Act (Chapter 30, Section 152, Cahill's Illinois Revised Statutes of 1929) provides:

> "The provisions of this act shall not apply to land in any county until this act shall have been adopted by a vote of the people of the county * * *."

The provisions of the act were *voluntarily* adopted by vote of the people of Cook County, Illinois, at the election in November, 1897.

Section 46 of the Illinois Torrens Act provides:

> "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

The land in question was *voluntarily* brought under the act by Edward J. Haley and Mary A. Haley, his wife, and the provisions of the act thereby *voluntarily* adopted.

By mesne conveyances the title was passed *voluntarily and under the terms of the act* to Edward Eliason and Elin Eliason, his wife, who thereby took subject to the agreement running with the land by virtue of the statute that the title should be subject to the terms of the act.

The purpose of the Illinois Torrens act is to allow an innocent purchaser for value to rely upon a certificate of title issued by the Registrar of Titles, and the appellants, Edward Eliason and Elin Eliason, by acquiring a certificate of title issued by the Registrar of Titles thereby held out to innocent purchasers for value of the property in question that they could rely upon the certificate of title for that property issued by the Registrar of Titles.

In the case of *In re Bickel*, 301 Ill. 484, 134 N. E. 76, the purpose of the Torrens system was stated as follows:

> "The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title; (*Glos* v. *Kingman & Co.*, 207 Ill. 26); to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place; (*Hacken* v. *Isenberg, supra*); to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested; (*Robinson* v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129); to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in that regard; (3 Tiffany on Real Property,—2d ed.—2273;) and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested.

(23 R. C. L. 273.) The basic principle of the system is the registration of the title to the land, instead of registering, as under the old system, the evidence of such title. (34 Cyc. 598.)"

Under any system of dealing with real estate titles, every transfer of land may be looked at from one of two standpoints, either from the standpoint of the party claiming to be the owner or the standpoint of the party dealing with the land. In the case of a sale, it may be looked at from the standpoint of the vendor or the vendee. Appellant's on Page 22 of their statement say:

> "It is a high ideal to establish a system of evidencing land titles which *at the time of acquiring title* shall protect a purchaser in expending his money. But it is a much higher ideal that such system shall protect an owner in the enjoyment of his property, *after it has been acquired.*"

The Supreme Court of Illinois has held in the following cases that it is the purpose of the Illinois Torrens act to protect the person dealing with the land and relying on the outstanding certificate of title:

In *re Bickel,* 301 Ill. 484, 134 N. E. 76; *Hacken* v. *Isenberg,* 288 Ill. 589, 124 N. E. 306; *Evans* v. *Chicago Title & Trust Co.,* 317 Ill. 11, 147 N. E. 412.

This has now become a settled rule of property in Illinois, and appellants would ask this honorable court to change that rule of property as laid down by the Supreme Court of Illinois and substitute another because appellants say that it is a much higher ideal.

Where the rule is one affecting title to real estate within the State and has been repeatedly determined by decisions of state courts so that it is established as the law of the State, there has been no departure from the rule that the federal courts will follow the decisions of the state courts. to avoid the uncertainty and injustice which result from

"the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior to decide which is right," the United States Supreme Court has not hesitated when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions once it has become evident that they have established a "rule of property" as the settled law of the State. *Hines Yellow Pine Trustees* v. *Martin,* 268 U. S. 458, 69 L. Ed. 1050, 45 Sup. Ct. 543.

The Supreme Court of the United States has taken this position with reference to decisions of the Supreme Courts of Hawaii and the Philippine Islands in land title registration cases.

Lewers & Cooke v. *Atcherly,* 222 U. S. 285, 32 Sup. Ct. 94, 56 L. Ed. 202.

Gauzon v. *Compania General de Tabacos de Filipinas,* 245 U. S. 86, 62 L. Ed. 165, 38 Sup. Ct. Rep. 46, 42 Philippine Islands 985, 42 J. F. 1042.

Section 47 of the Illinois Torrens Act (Chapter 30, Section 95, Cahills' Illinois Revised Statutes of 1929) provides that on any transfer of title the owners' duplicate certificate of title must be produced.

In the petition filed in the Circuit Court of Cook County by appellants, to which demurrers were sustained, the statement is made that

> "your petitioners *entrusted to the said Napletone* a duplicate original of said contract of sale and also the Certificate No. 113893 evidencing the title of your petitioners in and to said premises."

In the statement as to jurisdiction on appeal (page 4) appellants have digested this portion of their petition as follows:

"In May, 1926, Napletone, a stranger to the title, *surreptitiously obtained* from appellants their certificate of title."

This Honorable Court is of course bound by the statement contained in the petition to which the demurrer was sustained that the owners' duplicate certificate of title was "entrusted" to Napletone by appellants, and not "surreptitiously obtained" from appellants by Napletone as set up in appellants' statement as to jurisdiction on appeal.

In other words, not only were appellants bound by the terms of the Torrens Act that an innocent purchaser for value could rely upon the outstanding certificate of title, but they actually "entrusted" the owners' duplicate certificate of title, without which a transfer could not be made, to Napletone, the party whom they claimed was guilty of a forgery of a deed.

The deed which is claimed to have been forged was filed for record in the office of the Registrar of Titles on May 19, 1926, as Document No. 303637. The owners' duplicate certificate of title No. 113893 which accompanied it, was admittedly genuine, and was the one "entrusted" by appellants to Napletone. The deed alleged to be forged ran to Jerome C. Napletone, the alleged forger. Napletone then received from the Registrar of Titles a certificate of title dated May 19, 1926, numbered 167919.

On May 29, 1926, there was filed in the office of the Registrar of Titles a deed from Jerome C. Napletone to Charles Wilborn and Carrie S. Wilborn, his wife, which was filed as Document No. 305058. It is not denied that said deed bore the genuine signature of Jerome C. Napletone. It was accompanied by said certificate No. 167919. The Registrar of Titles thereupon issued a certificate of title No. 175048 to Charles Wilborn and Carrie S. Wilborn, his wife, appellees herein. Charles Wilborn and Carrie S. Wilborn had no ac-

tual notice of the alleged forged deed. The certificate of title which they relied on was the genuine one numbered 167919 issued to Jerome C. Napletone. The deed which they relied on was a genuine deed from Jerome C. Napletone to themselves. If they could not rely on a genuine certificate of title and a genuine deed to themselves from the holder of that certificate of title, it means that the purpose of the Torrens Act as stated by the Supreme Court of Illinois cannot be carried out. Not only that, but it also means the purpose of the Illinois Torrens Act in requiring the production of the owners' duplicate certificate of title as a means of safety on any transfer of title means nothing, since an owner, if appellants' views of the law are correct, could "entrust" his owners' duplicate certificate of title to whom he pleased without fear of consequences.

In deciding this case (*Eliason* v. *Wilborn*, 335 Ill. 352, 167 N. E. 101), the Supreme Court of Illinois said:

> "The land in this case was first registered in the names of the Haleys and a certificate was issued to them. When appellants bought it they knew the title had been registered, and they took it subject to all of the rights, privileges and limitations of such registration and the law applicable thereto. They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms. The title was registered in appellants under section 47, which provides that when a registered owner desires to sell his land he may transfer it by deed, and upon filing the deed in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferor has the title proposed to be transferred, he shall issue and register a new certificate in the name of the applicant. After the title was registered in appellants it could not be registered in Napletone until the duplicate certificate to appellants was surrendered to the registrar. If section 47 had been complied with it would have been impossible for Napletone to have ac-

complished this fraud. The act erected a safeguard against a forged transfer being registered, by the requirement that no transfer should be registered unless the owners' certificate was produced along with the instrument of transfer. Section 101 provides that any person wrongfully deprived of any land through the bringing of the same under the provisions of the act or by the registration of any other person as owner of such land, the person who is barred or who in any way is precluded from bringing an action for the recovery of such land shall have a right of action for damages against the county and may file a claim with the county board or bring an action at law for the recovery of such damages. In *Board of Education* v. *Blodgett*, 155 Ill. 441, it was held that the deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away."

The Registrar of Titles of Cook County respectfully represents that this decision of the Supreme Court of Illinois presents no federal question for the Supreme Court of the United States to review.

B.

Appellants bound by provisions of Torrens Act.

Appellants in their statement as to the jurisdiction of this court on appeal have raised the point that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which imposes such consent or agreements as a condition to the exercise of a right or privilege granted by such statute. (Pages 9 and 10 of appellants' statement.) They cite cases involving state statutes imposing conditions on foreign corporations for the privilege of doing a local business and a California case in which the state required a private carrier to assume the

duties of a common carrier as the price for the privilege of using state highways.

It is useless to take up those cases in detail for they have no application to the present facts or the conditions under the Torrens law. In the removal cases and tax cases cited by appellants, a condition was annexed by state statutes to the privilege of doing a local business which involved the giving up by the foreign corporation of another right or privilege which the corporation had, thus placing them on terms of inequality with others engaged in the same local business. In the California case where a private carrier had to assume the duties of a common carrier as the price for using state highways, it was placed on an inequality with private carriers who did not use state highways. Of course the state would have no right in any of the cases cited to force inequality of rights on those who are in the same line of business.

Such cases have nothing to do with, and are not parallel with, the conditions under the Illinois Torrens Act. Under the Torrens Act every property owner in Cook County is on the same basis. He may or may not register the title to his property as he himself desires. The statute imposes no conditions. It is up to his own judgment. Every purchaser of Torrens property is on exactly the same basis. The statute imposes no conditions. He may purchase or not as he desires. In assuming the benefits or burdens of the Torrens Act, the person registering or purchasing assumes exactly the same benefits and burdens as every one else in like position. Everyone is treated alike. The statute makes no discrimination, and imposes no unequal conditions.

But a person accepting the benefits of the Torrens Act cannot pick out those which he deems satisfactory and disregard those which he deems unsatisfactory. To do that, or to be able to do that, would bring about that very in-

equality in like circumstances which were found in the removal, tax, and private carrier cases.

In this case appellants claim their own title under and by virtue of the Torrens Act. The provisions of the act are covenants running with the land which bind them. This very proceeding is a special one provided for by the Torrens Act only, and in which the Circuit Court of Cook County would not have jurisdiction unless the provisions of the act continuously bound the land in question. Yet appellants seek the benefits of the act which satisfy them, and to escape from the provisions of the act with which they are not satisfied.

A long line of cases hold that this cannot be done.

In *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307, 73 L. Ed. 104, 106, decided January 2, 1929, by the Supreme Court of the United States, the court said:

> "It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. *Wall* v. *Parrot Silver & C. Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609; *Electric Co.* v. *Dow,* 166 U. S. 489, 41 L. Ed. 1088, 17 Sup. Ct. Rep. 645; *Eustis* v. *Bolles,* 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131; *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83; *St. Louis Malleable Castings Co.* v. *George C. Prendergast Constr. Co.,* 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178. Upon like principle, we think that appellants, who have procured action by a state commission under a state statute, may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the state constituion. *Cf. Shepard* v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737. The sound discretion which controls the exercise of the extraordinary powers of a federal

court of equity should not permit them to be exerted to relieve suitors on such a ground from the very action of state authorities which they have invoked."

In *St. Louis Malleable Casting Company* v. *George C. Prendergast Construction Company*, 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178, it was held that an owner of property within a special sewer district, who connected his premises with the sewer when constructed and availed himself of its benefits, is estopped from maintaining a suit in which, upon the ground that the manner of constituting the district and apportioning the cost infringed his rights under the Fourteenth Amendment, he seeks to cancel the tax bill issued to the contractor against his property.

In *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83, the Supreme Court of the United States said:

"Appellant sought a temporary injunction restraining the Virginia Commission of Fisheries from removing the stakes and marks which designated the boundaries of certain oyster grounds in the Rappahannock River, planted by him and which he claimed the right to occupy, and thereby opening the same for public use and enjoyment."

"He maintained that the Commission was proceeding under a state statute invalid because it failed to provide for proper notice and hearing and that the proposed action would deprive him of property without due process of law contrary to the Fourteenth Amendment."

"A majority of the three judges composing the court below concluded—264 Fed. 116—that the Commission had acted in substantial compliance with the challenged statute, that whatever rights or property appellant claimed in respect of the specified lands, or the oysters thereon, were necessarily based upon the statute itself and that he could not both assail it and rely upon it in the same proceeding. * * * We find no reason to interfere with this decree and it is affirmed."

In *Shepard* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737, the effect of a state statute as an implied contract by one taking advantage of the statute was adverted to by the Supreme Court of the United States. The court said:

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid and the expense thereof, which he ought to pay, transferred to a third person." • • •

"The plaintiffs have referred to *O'Brien* v. *Wheelock*, 184 U. S. 450, as the chief authority to support their contentions as to estoppel. In that case, while the estoppel contended for was denied, yet (at page 491) it is stated, in the opinion of the court, which was delivered by the Chief Justice, that: 'The result is not inconsistent with the cases that hold that, although a law is found to be unconstitutional, a party who has received the full benefit under it may be compelled to pay for that benefit according to the terms of the law. This is upon the theory of an implied contract, the terms of which may be sought in the invalid law and which arises when the full consideration has been received by the party against whom the contract is sought to be enforced.'"

"In the case at bar it is seen that the plaintiffs did in fact receive the full consideration for the contract. They obtained the improvement asked for, so far as the doing of the work was concerned, although the results arising therefrom were a great disappointment to them."

In *Wight* v. *Davidson,* 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900, the court said:

> "The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid."

In *Wall* v. *Parrot Silver & C. Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609, which involved a charge of fraud, the Supreme Court of the United States said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Electric Co.* v. *Dow,* 166 U. S. 489; *Pierce* v. *Somerset Railway,* 171 U. S. 641; *Leonard* v. *Vicksburg, Shreveport & Pacific R. R. Co.,* 198 U. S. 416, 422. They cannot claim the benefit of statutes and afterwards successfully assert their invalidity. There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

In *Bartlett Trust Co.* v. *Elliott,* 30 Fed. (2nd) 700, the court said:

> "Even the provisions of the Constitution are not always available to the litigant. A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States. Provisions of a constitutional nature, intended for the protection of a property owner, may be waived by him when by a course of conduct it would be unjust to permit him to assert them."

In *Dunn* v. *Fort Rend County,* 17 Fed. (2nd) 329, the court, quoting from *Muscatine Lighting Co.* v. *Muscatine* (D. C.), 256 Fed. 933, said:

"A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition."

In Cooley's Constitutional Limitations (8th Ed.), Volume 1, page 368, it is said:

"There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege if he received the compensation awarded, or brought an action to recover it. So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the grounds of unconstitutionality is removed."

In *Haskell* v. *New Bedford*, 108 Mass. 208, the Supreme Judicial Court of Massachusetts said:

"The omission to make due compensation for private property or rights appropriated by authority of the legislature to the public use can be taken advantage of by the owner only, and, if he once assents to the taking, cannot afterwards be availed of by himself or those claiming under him."

In *Baker* v. *Braman*, 6 Hill (N. Y.) 47, it was held that a person may renounce a constitutional provision made for his own benefit. The Supreme Court of New York said:

"The case of *Taylor* v. *Porter* (4 Hill, 148) held the statute authorizing ane man to take the property of another for his own use, though under an appraisement of its value, to be void. The action was trespass *quare clausum fregit* by the owner; and a justification was pleaded without averring the plaintiff's consent. The decision proceeded on the ground that the land was taken *in invitum;* and Mr. Justice Bronson concedes in terms that the objection has no application where the owner consents. It was thrown out in the course of the argument of the present case, that such consent not being in writing, the title would still be void under the statute of frauds. The answer is that the owner's consent takes away all objection to the statute in relation to private roads. True, the road being an incorporeal hereditament, it could not be granted even at common law without a deed. But it was competent for the legislature to create an exception both to the common law rule and the statute of frauds. They have done so by the statute in question. In the light of the constitution, if not that of a law which lies at the foundation of all governments, this statute must be read with the proviso that the owner consent. That consent removes all obstacle and lets the statute in to operate the same as if it had in terms contained the condition. Clearly we may say of a statute as much as we do every day of deeds and other private acts, *valeat quantum valere potest.*"

"By bringing an action for the damages assessed, we have the clearest manifestation of consent; and an adoption of the machinery provided by the statute for effectuating the grant. The provision of the fundamental law was for the benefit of the owner only; and the maxim, *quilibet potest renunciare juri pro se introducto,* applies as well to constitutional law as to any other."

The case of *Baker* v. *Braman,* 6 Hill (N. Y.) 47, has been expressly approved by the New York Court of Appeals. In the case of *Embury* v. *Conner,* 3 N. Y. 511, the court held that a party may renounce a constitutional provision made for his benefit, and a law therefor which provides for the

transfer of property from one individual to another with the consent of the owner is not unconstitutional. The court said:

> "If the principles held in the case of *Baker* v. *Braman*, (6 Hill. 47), are sound—and I think that they are—they may be properly applied in this case. It was there held that the owner's consent took away all objection to the statute in relation to private roads; although the road was an incorporeal hereditament and could not therefore be granted even at common law without a deed, as it was competent for the legislature to create an exception both to the common law rule and the statute of frauds; and that the legislature had done so by the statute then in question. The action in that case was brought to recover the damages assessed by a jury, for a private road, which the commissioners of highways had laid out through the plaintiff's lands pursuant to 1 R. S. 517, Secs. 77, 78. It was there held that a person might renounce a constitutional provision made for his benefit, and that if a private road be laid out pursuant to the statute, with the consent of the owner of the land, the proceeding was valid, and that such consent need not be in writing; that a parol consent was sufficient; and that the bringing of an action after the road was so laid out and his damages had been assessed, was a sufficient manifestation of consent, and an adoption of the machinery provided by the statute for effectuating the grant. *Lee* v. *Tillotson* (24 Wend. 337), and *The People* v. *Murray* (5 Hill 472) are cases to show that a party may waive a constitutional as well as a statute provision made for his own benefit."

From the foregoing cases there can be no question that appellants in this case are in no position to challenge the validity or constitutionality of any of the provisions of the Torrens Act of Illinois complained of by them.

C.

No federal question involved.

Appellants have also sought to claim that the United States Supreme Court has the right to determine whether the acts or omissions to acts of appellants in fact constituted a waiver. (Appellants' statement, page 10.) That power has already been expressly denied by the Supreme Court of the United States.

In *Pierce* v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316, 19 Sup. Ct. Rep. 64, the Supreme Court of the United States said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one."

In *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. The Supreme Court of the United States held that whether that view of the case was sound or not it was not a Federal question, and therefore not within the province of the Supreme Court of the United States to inquire about.

D.

Remedy against "indemnity fund."

Assurance or indemnity funds are usually provided in Torrens Acts for the purpose of indemnifying those who, relying upon the provisions of the Torrens Act, neverthe-

less suffer some loss or damage by reason of the operation of such act. Such funds are created and maintained through contributions of those who deal with the land registered under the Torrens system, and, when thus created cannot be regarded in the same light as funds raised by general taxation.

But even though assurance or indemnity funds under Torrens acts were created wholly through general taxation, it cannot be said that they are not raised and expended for public purposes. The Supreme Court of the United States has said that it is indisputable that the general welfare of society is involved in the security of titles to real estate and in the public registry of such titles.

> *American Land Co.* v. *Zeiss,* 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

It is obvious that the power to legislate as to such subjects inheres in the very nature of government. Assuming the right to regulate the transfer and devolution of real property; assuming the right of taxation over it, and making its protection a matter of daily concern, there is every reason why any state government should assure the holder of such title that it is good and in the event that loss or damage is sustained through defects therein should reimburse him for such loss or damage.

Such assurance of title does not amount to insurance of title. It has nothing to do with gambling with known defects in title. It is dealing only with the truth and assurance of truth. The citizens of any state are entitled to that much from their government.

In the case in which the first Ohio Act was held unconstitutional (*State* v. *Guilbert,* 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 A. S. R. 756), it was said:

> "Considering the purposes for which government is instituted and the high conception of individual right

which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may, by law authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself."

This decision of the Supreme Court of Ohio has been often cited by other courts, but never followed, and a new Torrens Act was passed in Ohio which has since been upheld. In making such a holding, the Supreme Court of Ohio failed to differentiate between assurance of title which is nothing more or less than an assurance of the truth as to the title, and insurance of titles which means guaranteeing against loss or damage which may arise through defects in titles, even though the defects are known at the time that the title insurance policy is issued. Assurance as to the true state of the title is well within the power of the state as a matter of public concern. Insurance of bad or defective titles is a matter of private business with which Torrens Acts are not concerned.

In discussing the assurance or indemnity features of the Colorado Act, the Supreme Court of Colorado called attention to the fallacy of the assumption that the Torrens Act engages the state in the business of insuring titles.

White v. *Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918 E. 179.

After setting forth the provisions of the act, the court said:

"We are unable to appreciate wherein these provisions make the state an insurer of title. The act pro-

vides a remedy for mistake committed by the governmental officers, and also against other parties; but in such instance it only agrees to pay upon the happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to registrar by each person registering title to land. It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection, to that extent in favor of any one who might perchance be injured without other remedy by reason of the provisions of the act. It is quite probable, although unnecessary to determine, that the law could stand even though this indemnity feature were eliminated, and no provisions made for any such suit by claimants."

See also in this connection:

Jones v. *York County*, 26 Fed. (2nd) 623, (U. S. C. C. A. Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

In *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175, the Supreme Court of Illinois took the same view as the Supreme Court of Colorado and said:

"In our view of the case the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it."

The assurance or indemnity feature of the Illinois Torrens Act is in reality only an additional benefit created by that act of which appellants may avail themselves if the deed which they complain of was in fact a forgery. The Illinois Torrens Act could stand without an indemnity feature and the decision of the Supreme Court of Illinois be affirmed in view of the assumption of the provisions of the

act by appellants. The fact that an indemnity feature exists is a matter of benefit for appellants, if they have been really injured, and not a cause for attack upon the act.

The suggestion implied in the decision of the Supreme Court of Illinois in *Eliason* v. *Wilborn*, 335 Ill 352, 167 N. E. 101, that an indemnity fund is essential is at variance with its own decision in *People* v. *Simon, supra.* In either event, whether it is essential or not, it is there for the benefit of appellants and they became entitled to its benefit on assuming the provisions of the act by their purchase of the property in question.

CONCLUSION.

It is therefore respectfully submitted that if appellants have suffered any loss or damage, that loss or damage has occurred in consequence of their own acts; that no federal question is involved in this case; and that this appeal from the decision of the Supreme Court of Illinois should be dismissed at appellant's costs.

Respectfully submitted,

J. Scott Matthews,
Attorney and Counsel for Clayton F. Smith, Recorder of Deeds and Registrar of Titles of Cook County, Illinois.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES, OF COOK COUNTY, ILLINOIS, FOR LEAVE TO FILE BRIEF AND ARGUMENT ON THE MERITS OF THE CASE INSTANTER.

BRIEF AND ARGUMENT OF CLAYTON F. SMITH. REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, ON MERITS OF CASE.

J. SCOTT MATTHEWS,
Counsel For Clayton F. Smith, Recorder of Deeds and ex-officio Registrar of Titles of Cook County, Illinois.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION OF CLAYTON F. SMITH, REGISTRAR OF TITLES OF COOK COUNTY, ILLINOIS, FOR LEAVE TO FILE BRIEF AND ARGUMENT ON THE MERITS OF THE CASE INSTANTER.

Motion.

Now comes Clayton F. Smith, Recorder of Deeds and *ex-officio* Registrar of Titles of Cook County, Illinois, by J. Scott Matthews, his attorney and counsel and moves the court for leave to file a brief and argument on the merits of the case as *amicus curiae* instanter; in support of which motion the Registrar of Titles of Cook County, Illinois, presents the suggestion attached hereto, together with said brief and argument.

CLAYTON F. SMITH,
Recorder of Deeds and Ex-Officio
Registrar of Titles of Cook County, Illinois.

By.....
His Attorney and Counsel.

Suggestions in Support of Motion.

1. There has been heretofore filed with this Honorable Court by the Registrar of Titles of Cook County, Illinois, a motion to dismiss for want of jurisdiction and a statement of matter and grounds making against jurisdiction asserted by appellants. The motion was taken by this Honorable Court and continued to the final hearing of this cause.

2. The Registrar of Titles of Cook County, Illinois, now presents the brief and argument attached hereto on the merits of the case as the official representative of the people of Cook County. The Registrar of Titles believes that in a matter so important to the people of Cook County, Illinois, the official representative of the people of Cook County should be permitted to present their view of the issues in this case in which the constitutionality of the vital parts of the Torrens Act are attacked.

Respectfully submitted,

CLAYTON F. SMITH.
Recorder of Deeds and Ex-Officio
Registrar of Titles of Cook County, Illinois.

By.....
His Attorney and Counsel.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

This case is presumably brought for the purpose of determining whether a bona fide purchaser of real estate registered in Cook County, Illinois, under the provisions of "An Act concerning land titles," approved and in force in the State of Illinois May 1, 1897, commonly known as the Torrens Act, can rely upon a certificate of title issued by the Registrar of Titles of Cook County, Illinois, in accordance with the provisions of that act, or whether such bona fide purchaser must go back of said certificate of title and determine for himself if there has been any infirmity in the prior chain of title in the shape of a forged deed. Actually, as the question is presented to this Honorable Court, it is whether the Constitution of the United States, with the amendments thereto, is so inelastic that it will not admit of new methods in dealing with real estate titles in America, even with the consent of those so dealing.

In appellants' assignment of errors, it is claimed that Sections 40, 42 and 46 of the Torrens Act of Illinois are repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deny the equal protection of the laws and take property without due process of law. (Trans. of Rec. p. 30.) The question of the Fourteenth Amendment appears to have been raised in this Court for the first time, since in the Courts below it appears (Trans. of Rec. p. 22) that it was the Fifth Amendment, and not the Fourteenth, which it was claimed to be violating. The Fifth Amendment applies only to Congress and not to the States. Nevertheless this brief and argu-

ment will be based upon the assumption that it was the Fourteenth Amendment which was brought in question.

Since the purpose of an Act is always a matter of inquiry when the Fourteenth Amendment to the Constitution of the United States is invoked in order to have the Act declared invalid, it is not only fitting but essential that a brief statement of the history and purpose of the Torrens Act of Illinois, and perhaps other Torrens Acts of other States and Territories of the United States, should be given.

"Torrens System" defined.

By "Torrens" systems generally are meant those systems of registration of transactions with interests in land whose "declared object * * * is, under governmental authority, to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer. An important feature of the system is an indemnity fund to compensate any one who may be injured by the operation of the Act." (Hogg's Australian Torrens System, p. 1; Niblack's Analysis of the Torrens System, Sec. 8.)

The Torrens System of land title registration in the United States may be better defined as a system of the people, for the people, and by the people, of registering the title to land, with a guarantee by the people that the title as registered is correct.

It is perhaps unfortunate that this system of land title registration has become popularly known under the name of the man who was its originator in Australia, in that many people hearing of the "Torrens System" believe that it is some private system relating to real property, when in fact it is the people's own method of dealing with titles to real property.

Methods of dealing with land titles classified.

Although they may differ in detail, the methods of transferring title to, or dealing with, land throughout the United States may be divided into four general classes (*Cape Lookout Co.* v. *Gold,* 167 N. C. 63, 83 S. E. 3; Niblack's Analysis of the Torrens System, Sec. 2) as follows:

(1) Transfers or dealings without recording or registering; (2) Ministerial system of recording deeds or other written instruments; (3) Judicial system of registering titles; and (4) the Torrens System of land title registration.

"The first system is used in most of the counties in England, where land is transferred merely by the production and delivery of all the title deeds, including one from the seller to the purchaser. This is a substitute for the original common-law system of 'livery of seizin.' Under the law of primogeniture the eldest son inherits the real estate and the title papers go with the land. Until about fifty years ago land was scarcely considered a commercial commodity in England, and the rarity of its transfer made the above system less inconvenient than it would otherwise have been. Under that system the owner of land could borrow on the security of his land by merely depositing his title papers with the lender, who thus acquired an equitable lien on the land. This was popular with both borrowers and lenders, because it was cheap, safe and secret."

"The second system (of recording deeds) was the only one in use in this country before the adoption of the Torrens system, and prevails also in most of the countries of Europe, outside of England, and in South America and in Middlesex and York in England. In most of these countries, however, the conveyances are not recorded in full,

but merely a memorial, in a prescribed form, is copied on the records." (*Cape Lookout Co.* v. *Gold, supra.*)

The third or judicial system prevails to some extent in Russia, Turkey, Norway, Mexico, and some other countries. "In these countries conveyancing and dealings with land are done under judicial supervision, and are subject to entries made by courts. The modes of procedure and the effect of these entries differ in the different countries, but the underlying principle of the system is that title vests from the date of the instrument when it has been presented to the court and the proper entries concerning it have been made on the records of the court." (Niblack's Analysis of the Torrens System, Sec. 4.)

The fourth system is the Torrens system of land title registration. Its distinctive feature is that "it registers and determines the condition and ownership of the title to land, in lieu of registering instruments as evidence of title." (Niblack's Analysis of the Torrens System, Sec. 5.)

What the Torrens System is.

The Torrens System of land title registration is at one and the same time a system of conveyancing and a system of title assurance. The word "assurance" is used advisedly rather than the word "insurance." The word "assurance" has been defined to be "any instrument which confirms the title to an estate." It was anciently used to evidence and assure title to the grantor in a transfer of real estate previously made. (*State* v. *Rhodes,* 77 Kan. 202, 93 Pac. 610, 612.)

In discussing the assurance or indemnity features of the Colorado Torrens Act, the Supreme Court of Colorado in the case of *White* v. *Ainsworth,* 62 Colo. 513, 163 Pac. 959, Ann Cas. 1918-E-179, called attention to the fallacy of the

assumption that the Torrens Act engages the State in the business of insuring titles. After setting forth the provisions of the Act, the Court said:

> "We are unable to appreciate wherein these provisions make the state an insurer of title. The act provides a remedy for mistake committed by the governmental officers, and also against other parties; but in such instance it only agrees to pay upon the happening of any of the events mentioned in the sections, and then only out of a certain fund, which is created by a payment to registrar by each person registering title to land. It is not intended for the insurance of land titles nor as compensation for land taken without the owner's consent, but merely as a safeguard or protection, to that extent in favor of any one who might perchance be injured without other remedy by reason of the provisions of the act. It is quite probable, although unnecessary to determine, that the law could stand even though this indemnity feature were eliminated, and no provisions made for any such suit by claimants."

See also in this connection:

Jones v. *York County*, 26 Fed. (2d) 623 (U. S. C. C. A., Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Methods of title assurance and title insurance in United States.

Strange as it may seem, a large proportion of the transfers of title of land in the United States are made without any real assurance that the title so transferred is good, or without any insurance against loss or damage resulting through defects in such title. This practice is largely due to ignorance of our recording and registry laws, and to

a large extent is indulged in by people who have emigrated from other countries.

Where some assurance is desired as to the title, the method most commonly used throughout the United States is to place reliance upon an abstract of title. Another method of guarding against loss by reason of defects in the title is by what is known as "title insurance" by title insurance companies. The third and last method of guarding against loss is the Torrens System of land title registration, which is primarily a system of title assurance and not insurance.

An abstract of title, properly prepared by a competent abstract maker and passed upon by a competent attorney, is a step far in advance of the older method of doing business by word of mouth or by laborious search through thousands of public records. Yet the fact remains that an abstract of title, even when prepared by the most skilled abstract maker and when passed upon by the most skilled attorney, cannot be relied upon as absolute evidence of title.

We need only apply a few tests in order to discover the accuracy of the statement. In the matter of forgery, delivery of deeds, identity of parties, sanity of parties, and occupancy and adverse possession, together with a number of other questions which might be mentioned an abstracter would have no notice of the rights of parties and an attorney examining the abstract would not be able to discover them from the abstract. And even though controverted matters may appear in the abstract, opinions of attorneys may differ as to their effect. So also abstracts of title, and copies of abstracts of title have proved but poor reeds to lean upon where assurance and evidence of title, and absolute protection are required.

Realizing the necessity of a better method of dealing with real estate titles, abstract companies themselves evolved

what is known as title insurance. Guarantee policies issued by such companies are a step in advance of abstracts of title in guaranteeing against loss or damage. But experience has shown that such guarantee policies can ordinarily only be issued subject to certain limitations, such as rights of adverse possession and matters not of public record. Nor do they wipe out defects in title. They merely guarantee over defects. Nor are they evidence of title in any suit at law or equity unless expressly made so by statute, while their guarantees are limited both as to amount and as to date.

With the trend of modern business life, a more efficacious method of dealing with land titles became necessary. As a matter of evolution the Torrens System of land title registration was bound to appear and did appear.

Origin of Torrens System.

The germ of the Torrens System may be said to have been planted in English jurisprudence by the publication of the Second Report of the Real Property Commissioners in 1830. This report, together with the reports of 1850 and 1857, contain valuable statements on many points of real property law and registration. The real birth of the system, however, occurred in 1858 in the enactment of two statutes by the South Australian Legislature at the instance of Sir Robert Torrens.

It is worthy of notice, in this connection, that Sir Robert was not a lawyer. He was a collector of customs, and very probably he worked out his system through analogy to the method by which the government furnished a certificate as evidence of one's ownership of a vessel. Manifestly his intent was to free land titles from the indictment of common sense, which is often framed in the impatient and seemingly unanswerable question: Why should there be

any greater uncertainty of ownership of land than of personalty, and why should land titles have to be searched through a "godless and profitless jungle?"

Since the system was introduced into South Australia in 1858, it has found more or less favor with people of English extraction. It seems that it yet has thorny paths to tread. Its author, as aptly said by the writer of the learned and interesting article on this system in 54 Central Law Journal 285, "little knew we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' 'the person under disability,' 'the absent defendant,' and other well known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of the American Constitution, before it could establish itself in the states of the American Union. Thus far, however, it is refreshing to know that the system has been adaptable enough to conform with American Constitutional government, and the attacks have only demonstrated its strength and worth.

Of the Torrens System as worked out by Sir Robert Torrens, it has been said:

> "The introduction of the system into South Australia was strongly opposed by lawyers of every class, from solicitors to judges, and no harder things have been said of the Torrens system generally than have been said of the South Australian Statutes in South Australia. It will probably be conceded that the English Act of 1862 was better drafted and more scientifically modeled in accordance with English real property law. Nevertheless in New Zealand the Land Reg-

istry Act of 1860, after a trial of ten years, and in Victoria and New South Wales Bills on the same lines, were all abandoned in favor of measures based on Sir Robert Torrens' Statutes, and the Australian system has been as successful in obtaining the approval of the public as the English system has been unsuccessful. One explanation, or a partial explanation of this, seems to be that the English Acts have, by that very adherence to the forms and principles of English land law and conveyancing in which Sir Robert Torrens' Act was strikingly deficient, failed to remedy the evils incidental to the existence of the equitable estate. The South Australian Statutes grappled with these evils—certainly rather from the point of view of a layman than a lawyer—with great boldness, and at the cost of neglecting the feudal rules which underlie real property law; but the result has been the nearest approach yet made in form to allodial ownership under purely English law." (Hogg's Australian Torrens System (1905), pages 21 and 22.)

Another author has given a more colorful description of the growth of the Torrens System as follows:

"It was adaptable and has proved capable of modifications suitable for the native folk-titles of Fiji or the medieval tenures of the Caroline-Anspach cities, for the equatorial ranches of Uganda as for the half-sections of the Canadian West. The nomads of the Algerian plains and the communal tribes of Papua, the shepherds of the Swiss mountain cantons, and the orange growers of California, alike came under the scheme, the essentials of which hold sway in the newest French Colony, in Styrian folk-law, and in American Corporation laws. It extends to 31 legislative units within the British Empire, to sixteen territories of the United States, to parts of Britain, and, in all essentials, to an area in Europe five times the size of England. It extends over the whole belt of French colonies on the Mediterranean, and at present, campaigns are being waged to extend it in America and to introduce it in France proper." (Roberts History of Australian Land Settlement, page 220.)

Historical Development of the Torrens System in the United States.

The earliest land title registration act in the United States was passed in Illinois in 1895, but was declared unconstitutional upon the ground that there was a delegation of judicial powers in violation of the Constitution of that State. (*People* v. *Chase,* 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105.) An Ohio Act of 1896 was held unconstitutional by the Supreme Court of that State, upon substantially the same ground, and upon the ground that the Act violated the due course of law guaranteed by the Ohio Bill of Rights, in that it provided for inadequate service, especially upon known adverse claimants residing in the State, and upon the further ground that it attempted to authorize the taking of private property for uses not public, without compensation. (*State* v. *Guilbert,* 56 Ohio St. 575, 47 N. E. 551, 60 A. S. R. 756, 38 L. R. A. 519.)

In 1897 the Legislature of Illinois passed another law designed to meet the constitutional tests fixed by the Supreme Court of Illinois, and that Act was sustained as constitutional. (*People* v. *Simon,* 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. R. 175.) So also in 1913, after an amendment to the Constitution of Ohio a registration Act was passed which was held not to be objectionable. (*Persinger* v. *Britton,* 29 O. C. A. 316, 10 App. 164.)

The States and Territories of the United States which have enacted land title registration Acts, with the date of the first enactment in the States or Territories, are as follows:

> Illinois (1897), California (1897), Massachusetts (1898), Minnesota (1901), Oregon (1901), Colorado (1903), Washington (1907), New York (1908), North Carolina (1913), Mississippi (1913), Ohio (1913), Ne-

braska (1915), Virginia (1916), South Carolina (1916), Georgia (1917), Utah (1917), Phillipine Islands (1902), and Hawaii (1903).

Object and Purpose of Torrens System.

In writing of the object and purpose of the Torrens System there has been a confusion in the minds of writers between purpose, method and effect. The purpose or object of a system of land title registration is the ideal which is kept before the mind as the particular thing to be attained. The method is the orderly procedure which is followed. The effect is the result or product of that orderly procedure.

It has been said that a desirable system of conveyancing and of dealing with land must possess four qualities; it must be simple, secure, rapid and cheap. To these an Australian writer has added two more features as the attributes of a perfect conveyancing system, namely, accuracy and suitability to circumstances. These six features of simplicity, security, rapidity, cheapness, accuracy and suitability to circumstances may well be considered as the object and purpose of the Torrens System.

Method of Original Registration.

The method used in the United States to further the object and purpose of the Torrens System as above set forth is a judicial proceeding. It is now clearly established by the great weight of authority that a land title registration proceeding is an action *in rem* and not *in personam*.

Carino v. *Philippine Islands*, 212 U. S. 449, 29 Sup. Ct. 334, 53 L. Ed. 594.

Robinson v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

Cooper v. *Buxton*, 186 Cal. 330, 199 Pac. 6.

Rock Run Iron Co. v. *Miller*, 156 Ga. 136, 118 S. E. 670.

Tyler v. *Judges of Court of Registration,* 175 Mass. 71, 55 N. E. 812, 41 L. R. A. 433.

First Nat. Bank v. *Woburn,* 192 Mass. 220, 78 N. E. 307.

State v. *Westfall,* 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297, 89 Am. St. 571.

Dewey v. *Kimball,* 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

Drake v. *Fraser,* 105 Neb. 162, 179 N. W. 393, 11 A. L. R. 766.

Stewart v. *Kellough,* 104 Ohio St. 347, 135 N. E. 608.

Ashton-Jenkins Co. v. *Bramel,* 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Roxas v. *Enriques,* 29 Phil. Islands 31, 29 J. F. 31.

Grey Alba v. *De La Cruz,* 17 Phil. Islands 49, 17 J. F. 50.

An applicant for initial registration must establish title in himself as against the whole world before he can ask to have his title registered. The act authorizing registration is not a substitute for a bill in equity to remove a cloud from title and only authorizes initial registration of a title good against everyone.

Teninga v. *Glos,* 266 Ill. 94, 107 N. E. 125.

Waugh v. *Glos,* 246 Ill. 604, 92 N. E. 974.

Glos v. *Kingman & Co.,* 207 Ill. 26, 69 N. E. 632.

Glos v. *Cessna,* 207 Ill. 69, 69 N. E. 634.

Brooks v. *Glos,* 243 Ill. 392, 90 N. E. 751.

Glos v. *Wheeler,* 229 Ill. 272, 82 N. E. 234.

Glos v. *Holberg,* 220 Ill. 167, 77 N. E. 80.

In Illinois the fee simple title must be first registered. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 56.) The statute also contains adequate provisions for making all persons having or claiming any interest or estate in the land parties defendant. (Cahill's Ill. Rev. Statutes, 1929,

Ch. 30, Secs. 59, 66, 67, 68, 69, 70. See also *People* v. *Simon*, 176 Ill. 165, 52 N. E. 910, 68 A. S. R. 175, 44 L. R. A. 801; *Ambos* v. *Glos*, 314 Ill. 438, 145 N. E. 639.)

Where the statute is complied with, and the entire world are made defendants before proper tribunal or competent jurisdiction, it would necessarily follow that a decree entered in such a proceeding would be conclusive as against the world without any statutory statement to that effect. The statute in Illinois, however, attempts to give greater rights to adverse claimants and a longer time for asserting those rights than is given by any other American Torrens Act. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 74, 75, 76.) When the statutory time for asserting adverse claims is passed, an applicant has a title, the conclusiveness of which has been established in a thoroughly American manner by a court of competent jurisdiction by whom the rights of all parties have been properly adjudicated. In suitability to circumstances, therefore, it may be said that initial registration under the Torrens System is more thoroughly American and democratic, in giving everyone a square deal, than dealing with property titles by means of abstracts of title and guarantee policies where rights of innocent parties may be omitted from the one or guaranteed over by the other.

Method after registration.

The method used in American Torrens Acts after registration to further the object and purpose of simplicity, security, rapidity, cheapness, accuracy and suitability is:

(a) The creation and use of a certificate of title which sets forth in plain English the true condition of title to the extent required by law.

(b) The transfer of estates or interests only by registration upon the certificate of title.

(c) The creation of charges and liens only by notation as memorials upon the certificate of title.

(d) The protection of other rights or adverse claims by the registration of affidavits or caveats upon the certificate of title.

(e) A low schedule of fees and costs.

(f) The protection of innocent persons who are injured through the operation of the Statute by the creation of an indemnity fund.

Effect of methods used.

The effect of the methods used in original registration of title and after registration is:

(a) The creation within a state of a new and independent system of registration of title to property, the other and older system being the registration under the recording acts of the various instruments evidencing the title.

(b) The creation of one estate in land—the registered title.

(c) The creation of an indefeasible title, except as noted in the certificate of title, and to the extent allowed by law.

With a certificate of title which can thus be relied upon by any party dealing with the land, which certificate of title gives in plain English the names of the registered owner, and the estates, charges, and liens to which the title is subject, requiring no long search of a previous chain of title, and furnished for the ministerial cost of printing and typewriting the certificate, the object of simplicity, security, rapidity, cheapness, accuracy and suitability is thus obtained.

Facts of this case.

This case arises under a supplemental petition filed by Edward Eliason and Elin Eliason, his wife, in original land registration proceeding No. 11946 in the Circuit Court of Cook County, Illinois, under the provisions of Sections 93 and 94 of the Torrens Act. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 134 and 135.) In form it purports to be a petition to control the actions of the Registrar of Titles of Cook County, but the Registrar of Titles was never served. Demurrers of other defendants to the petition were sustained in the Circuit Court of Cook County and the action of the Circuit Court affirmed in the Supreme Court of Illinois.

The petition alleges that the premises in question were *"duly registered"* in the office of the Registrar of Titles in accordance with a decree of court on August 6th, A. D. 1921, in the names of Edward J. Haley and Mary A. Haley, his wife. (Trans. of Rec. p. 1.)

There is no averment in the petition of any infirmity in the original registration proceeding. The fact that the title to the premises was "duly registered" is equivalent to the statement that

(a) The title to the premises in question was regularly registered, with all judicial safeguards under a new and independent system of registration of title to property;

(b) That one estate in said premises had been created—the registered title;

(c) That an indefeasible title to said premises, except as noted in the certificate of title and to the extent allowed by law, had been created.

Since registration of title under the Illinois Torrens Act (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 55) is purely

voluntary (*Anderson* v. *Shepard,* 285 Ill. 544, 121 N. E. 215), the averment that the title to the premises was "duly registered" is also equivalent to an averment that it was *voluntarily* registered.

The averment that the title to the premises was "duly registered" also means

(a) That the applicants in such registration proceedings at the time of such proceedings paid into the indemnity fund created by the act one-tenth of one per cent of the value of the land (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 140), and thereby in common with all other applicants contributed to a common fund from which to pay loss or damage.

(b) That the applicants thereby entered into an agreement which shall run with the land "that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act." (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 94.)

If a separate and distinct consideration was needed in order to give validity to this agreement of the applicant on the creation of the statutory registered estate that the provisions of the act should be covenants running with the land, the payments of other owners into the indemnity fund would form sufficient consideration for such agreement just as the payments made by the applicants would be sufficient consideration for the agreements of owners of other registered property.

Such covenants running with the land would include the provision of the act making registration by the Registrar of Titles, and not delivery of a deed by the grantor, the essential element in a transfer of title. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 102.) Under the act a deed

"shall take effect only by way of contract between the parties thereto, and as authority to the Registrar to register the transfer * * * upon compliance with the terms of this act." This provision of the act does not say that a registration can only be had by deed of the registered owner. It merely limits the effect of such a deed when given. Other provisions of the act necessarily deal with transfers by the Registrar even against the will of the registered owner as in the case of foreclosure of liens, attachments, executions, etc.

Since there is no averment in the petition in this case to the contrary, it must also be assumed that a receipt of the petitioners for their certificate of title was on file with the Registrar of Titles; and that such receipt was *prima facie* evidence of the genuineness of such signatures. (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Sec. 85.)

Although this proceeding is to control the action of the Registrar of Titles, there is no allegation of any fraud on the part of the Registrar or that he did not proceed strictly in accordance with provisions of the statute relating to transfers by deed.

It must therefore be assumed that the Registrar of Titles in this case before registration of the deeds complained of performed the duties required under the following words of Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 95:

> "And upon filing such deed or other instrument in the Registrar's office and surrendering to the Registrar the duplicate certificate of title, and upon its being made to appear to the Registrar that the transferor has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided a new certificate. * * *."

In other words, there being no allegation to the contrary in the petition, it must be assumed that the Registrar of

Titles not only had the owner's duplicate certificate of title presented to him in this case, but that he also satisfied himself that the transferor had the right to have a transfer made by him and the transferee had the right to have the transfer made to him, and that the Registrar satisfied himself by comparison of signatures with the signatures on appellant's receipt, which signatures were prima facie genuine.

The allegations of facts as to the alleged forgery contained in the petition are briefly as follows:

Petitioners Edward Eliason and Elin Eliason, his wife, by mesne conveyances from the original applicants became the registered owners of the premises in question and had certificate No. 113893 issued to them on September 21, 1923, by the Registrar of Titles of Cook County. (Trans. of Rec. p. 1.)

On April 1, 1926, they entered into a contract of sale with George B. Kennedy and wife, (Trans. of Rec. p. 2), subject to a first mortgage of $2,700. (Trans. of Rec. p. 9.) The contract of sale does not appear to have been registered as required by the Torrens Act (Cahill's Ill. Rev. Statutes, 1929, Ch. 30, Secs. 107 and 108), but appears to have been in duplicate. The purchasers entered into possession of the premises, and the averment of payments made by them is that "up to the happening of the events hereinafter set forth" they made payments to petitioners. (Trans. of Rec. p. 2.) That the purchasers ceased to pay the petitioners and started to pay defendants is apparent from the prayer of the petition asking defendants "to account to your petitioners for any sum or sums paid to them by the purchasers under said contract." (Trans. of Rec. p. 6.)

In May, 1926, petitioners entered into negotiations with Jerome C. Napletone doing business as Bankers Discount

Co., for the sale to the said Napletone of said premises subject to the Kennedy contract and to the first mortgage of $2,700.

Petitioners expressly aver *"that in the course of the negotiations looking toward such sale, your petitioners entrusted to the said Napletone a duplicate original of said contract of sale and also the certificate No.* 113893 *evidencing the title of your petitioners in and to said premises."* (Trans. of Rec. p. 2.)

On May 19, 1926, Jerome C. Napletone deposited with the Registrar of Titles a warranty deed to said premises from petitioners to himself, together with the said certificate of title No. 113893, which was filed with the Registrar of Titles as Document No. 303637. On May 19, 1926, pursuant to said warranty deed the Registrar of Titles issued to Jerome C. Napletone a new certificate of title No. 167919 subject only to said $2,700 mortgage. It is alleged that the signatures of petitioners to said deed were forgeries and that the Notary Public who took the acknowledgment has stated to petitioners that he never saw them. (Trans. of Rec. p. 3.)

On May 29, 1926, there was filed in the office of the Registrar of Titles as Document No. 305058, a warranty deed from Jerome C. Napletone to Charles Wilborn and Carrie S. Wilborn, his wife, conveying said premises. It is not denied that the deed from Napletone to the Wilborns was genuine. On May 29, 1926, the Registrar of Titles issued certificate of title No. 175048 to said Charles Wilborn and Carrie S. Wilborn, his wife. (Trans. of Rec. p. 4.)

It is also averred that at the time of the execution and delivery of the warranty deed from Napletone to Wilborns, "the said Jerome C. Napletone also delivered to the said Wilborns the duplicate original" of the Kennedy contract, together with two purported and pretended assignments

of the vendor's interest in said contract, one purporting to be from the petitioners to Napletone (alleged to be a forgery) and one from Napletone to the Wilborns (not alleged to be a forgery). (Trans. of Rec. pp. 4 and 5.)

Although the duplicate original of the Kennedy contract of sale undoubtedly bore petitioners' genuine signatures, the alleged forger delivered it with the alleged forged assignment, and there are no allegations as to any difference in the signatures on the admittedly genuine contract and the alleged forged assignment delivered at the same time.

It is averred that between the recording of the two deeds and the issuance of the certificate of title to the Wilborns, the petitioners "protested" to the Registrar of Titles against issuing the certificate of title to the Wilborns. No proceeding in court by injunction or petition against the Registrar were filed, and it was not until after the Registrar had acted upon a genuine certificate of title and a genuine deed from Napletone to Wilborns that the petitioners brought this proceeding notwithstanding their prior knowledge. (Trans. of Rec. p. 4.)

The proceeding brought is a special one known only to the Torrens Act, and although petitioners claim that Sections 40, 42 and 46 of the Torrens Act relating to certificates of title are unconstitutional and void, and ask that certificates Nos. 167919 and 175048 be expunged and cancelled by reason of facts not shown upon such certificates, petitioners pray that in their own case the court may enter an order and decree finding title in petitioners.

> "*free and clear of all liens and encumbrances* except such as appear upon the certificate No. 113893, heretofore issued to your petitioners and subject only to said first mortgage for Twenty-seven Hundred ($2700) Dollars and the rights of the said George B. Kennedy and Pearl A. Kennedy, his wife, as purchas-

ers under said contract of sale and parties in possession." (Trans. of Rec. p. 6.)

In other words, although they protest against the Wilborns certificate being "free and clear" of liens, encumbrances and charges, except those noted thereon, they want the Registrar's actions confirmed as to themselves without further proof and to have their own certificate issued "free and clear" of everything except what they themselves specify, such certificate to be issued to them under sections of the Torrens Act which they claim are unconstitutional.

Resume of facts.

1. The Torrens Act of Illinois vests in the Registrar of Titles a reasonable discretion as to the facts surrounding a transfer.

2. It makes the receipt of each owner for his certificate of title prima facie evidence of the genuineness of such signature.

3. It requires the production of the owner's duplicate certificate of title before a transfer can be made.

4. It requires the Registrar of Titles to satisfy himself as to the rights of the transferor and transferee.

5. In Cook County it requires a bond of $200,000 of the Registrar of Titles to guard against any arbitrary action by him.

6. It allows recourse without fee on filing a petition to the Circuit Court to control any action of the Registrar of Titles which is wrongfully or negligently done, with appeal to the Supreme Court of Illinois.

7. In case of fraud, it allows any action of the Registrar of Titles to be set aside, providing the rights of persons

claiming under valuable consideration and in good faith have not intervened.

8. In case of loss in the latter event, it provides an indemnity fund for any injured party.

This is claimed by petitioners to deny them the equal protection of the laws and due process of law in a case where

1. The property was voluntarily registered under the Torrens law by petitioner's predecessors in title.

2. Where the provisions of the law are covenants running with the land.

3. Where no averments are made that the Registrar of Titles was guilty of any fraud.

4. Where it is not claimed that the Registrar of Titles did not have petitioners' genuine signature before him on their own receipt in accordance with the statute for his guidance.

5. Where the petitioners voluntarily gave up to the alleged forger their owner's certificate of title, without which no transfer could have been made.

6. Where the petitioners not only gave up their certificate of title, but also their own genuine duplicate original contract of sale to the alleged forger.

7. Where the petitioners voluntarily purchased registered property and made themselves subject to the law.

8. Where the petitioners, if there was in fact a forgery, have refused to take advantage of the indemnity fund which their predecessor in title helped to create.

9. Where the petitioners have taken advantage of the special provisions of the Torrens law allowing petitions to be filed against the Registrar of Titles to control his actions.

10. Where the petitioners have had a full hearing in the Circuit Court of Cook County and the Supreme Court of Illinois on their right of ownership to said property, and both courts have held against them.

On these facts it is respectfully submitted that the Torrens Act of Illinois affords full and equal protection to all parties similarly situated and due process of law both as to the acts of Registrar of Titles and the subsequent proceedings in the courts of Illinois.

BRIEF.

I.

The law of the state in which land is situated controls its alienation, transfer and descent. The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.

Clark v. *Graham*, 6 Wheat. 577, 5 L. Ed. 334.

Kerr v. *Moon*, 9 Wheat. 565, 570, 6 L. Ed. 161.

McCormick v. *Sullivan*, 10 Wheat. 192, 202, 6 L. Ed. 300.

Taylor v. *Benham*, 5 How. 233, 273, 12 L. Ed. 130.

McGoon v. *Scales*, 9 Wall. 23, 19 L. Ed. 545.

Burbank v. *Conrad*, 96 U. S. 291, 298, 24 L. Ed. 731.

Brine v. *Insurance Co.*, 96 U. S. 627, 639, 24 L. Ed. 858.

Schley v. *Pullman Car Co.*, 7. S. Ct. 730, 120 U. S. 575, 580, 30 L. Ed. 789.

Langdon v. *Sherwood*, 8. S. Ct. 429, 124 U. S. 74, 81, 31 L. Ed. 344.

DeVaughn v. *Hutchinson*, 17 S. Ct. 461, 165 U. S. 566, 570, 41 L. Ed. 827.

Clarke v. *Clarke*, 20 S. Ct. 873, 178 U. S. 186, 191, 44 L. Ed. 1028.

Olmstead v. *Olmstead*, 30 S. Ct. 292, 216 U. S. 386, 393, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1292.

Munday v. *Wisconsin Trust Co.*, 40 S. Ct. 365, 252 U. S. 499, 503, 64 L. Ed. 684.

People v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

Arndt v. *Grigg*, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. Rep. 557.

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

II.

The states may classify the subjects of legislation and make different regulations as to the property of different individuals differently situated.

Barbier v. *Connolly*, 113 U. S. 27.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

Chicago Dock Co. v. *Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

White River Lumber Co. v. *Arkansas*, 279 U. S. 692, 49 Sup. Ct. Rep. 457, 73 L. Ed. 512.

III.

The Torrens Law of Illinois introduces a classification of property. The basis of this classification is not purely arbitrary. It arises out of the difference of the two systems of registration, the one being a registration of the various instruments affecting the title, the other of the registration of the title itself. This is a reasonable basis of distinction.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

IV.

"The purpose of the Torrens Law was to provide a system of registration of land titles by which all instruments affecting the title should be filed and registered with one officer, who should be authorized to make a certificate of the title and show conclusively the state of the title and the person in whom it was vested, so that by a mere reference to the certificate the title to the land might be ascertained."

Kerr's Australian Lands Titles (Torrens) System, p. 165, Sections 310-314.

Gibbs v. *Messer* (1891), A. C. 248, 60 L. J. P. C. 20.

Kateneth Whakaruru et al. v. *The Public Trustee et. al.*, 12 New Zealand Law Reports 651.

Brown v. *Broughton*, 31 Western Law Reporter (Manitoba) 583.

Robinson v. *Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.

Frances Inv. Co. v. *Superior Court in and for Imperial County*, 189 Cal. 107, 208 Pac. 105.

In re Seick, 46 Cal. App. 363, 189, Pac. 314.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Malaguti v. *Rosen*, 262 Mass. 555, 160 N. E. 532.

State ex rel. Douglas v. *Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

Henry v. *White*, 123 Minn. 182, 143 N. W. 324, L. R. A. 1916 D 4.

Baart v. *Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.

Reed v. *Siddall*, 94 Minn. 216, 102 N. W. 453.

Shevlin-Mathieu Lumber Co. v. *Fogarty*, 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins Co. v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

Brace v. *Superior Land Co.*, 65 Wash. 681, 118 Pac. 910.

McMullin & Co. v. *Croft*, 96 Wash. 275, 164 Pac. 930, reversing on rehearing 92 Wash. 411, 159 Pac. 375.

V.

Certainty against the unknown is the chief end of the Torrens System. Each Torrens Act should be liberally construed so as to effect that purpose.

Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 151.

Crowell v. *Akin*, 152 Ga. 126; 108 S. E. 791, 19 A. L. R. 51.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

VI.

The act of registration by the Registrar of Titles is the operative act to convey or affect land.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

In re Juran, ... Minn. ...., 226 N. W. 201.

In re Abrahamson v. *Sundman*, 174 Minn. 22, 218 N. W. 246.

Dobek v. *Jennings* (1928), 1 D. L. R. 736.

VII.

The adoption of the Torrens Act in Illinois is voluntary by the voters of each county. In each county in which the act is adopted, the bringing of land under the act is left to the voluntary action of owners of real estate.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

VIII.

The effect of voluntary registration is not to provide a general waiver of constitutional guarantees for future transactions. The real effect is to transfer property from the class of non-registered property to the class of registered property, and to exchange the rights, privileges and liabilities of one class for the rights, privileges and liabilities of the other class.

Tyler v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812; writ of error denied, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252.

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

Evans v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

Hooper v. *Haas*, 332 Ill. 561, 164 N. E. 23.

IX.

Equal protection of the laws under the Fourteenth Amendment does not guarantee equality of operation as between the great classes of property in Illinois—registered and non-registered. It guarantees equal protection within the class.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 293, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037.

Williams v. *Walsh*, 222 U. S. 415, 32 Sup. Ct. Rep. 137, 56 L. Ed. 253.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

X.

In order to violate the equal protection clause of the Fourteenth Amendment there must be an intentional violation of the essential principle of practical uniformity. Mere errors of judgment by officials will not support a claim of discrimination. No discrimination by the Registrar of Titles is charged in this case.

Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154.

XI.

The due process clause does not render our law incapable of progress or improvement.

Hurtado v. *California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.

Sperry & Hutchinson Co. v. *Rhodes*, 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561.

XII.

"The provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

American Land Co. v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82.

XIII.

The discretionary powers of the Registrar of Titles are not obnoxious to the due process clause of the Fourteenth Amendment.

Dreyer v. *Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79.

XIV.

The Illinois Torrens Act provides adequate safeguards for all acts of the Registrar of Titles to prevent arbitrary action or discrimination.

(a) The certificate must contain identifying facts.

Torrens Act, Section 33 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 81.

(b) The handwriting of the owner is preserved for comparison.

Torrens Act, Section 37 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 85.

(c) An owner's duplicate certificate is delivered to the owner.

Torrens Act, Section 36, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 84.

(d) The owner's duplicate must be surrendered upon a transfer.

Torrens Act, Section 47, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 95.

(e) Proofs as to the rights of the transferer and transferee must be made to Registrar at the time of transfer.

Torrens Act, Section 47, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 95.

(f) The Registrar of Titles must file a $200,000 bond.

Torrens Act, Section 2, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 50.

(g) The Registrar is liable for neglect of himself or his deputies.

Torrens Act, Section 6, (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 54.

(h) Petitions may be filed in the Circuit Court to set aside wrongful acts of the Registrar.

Torrens Act, Sections 93-94 (Cahill's Ill. Rev. St., 1929), Ch. 30, Secs. 134-135.

(i) Such petitions may be filed without any fee being paid therefor.

Torrens Act, Section 107 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 148.

(j) Damages, including reasonable attorney's fee, may be recovered from the indemnity fund for unauthorized acts of the Registrar.

Torrens Act, Section 96 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 137.

(k) Indemnity fund is created for the payment of damages.

Torrens Act, Section 102 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 143.

(l) A right of action for such damages is given against the county.

Torrens Act, Section 101 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 142.

(m) The right of filing an original bill or petition in equity in any court of competent jurisdiction is preserved.

Torrens Act, Section 94 (Cahill's Ill. Rev. St., 1929), Ch. 30, Sec. 135.

These provisions constitute due process of law.

XV.

Petitioners themselves in this case are directly responsible for any loss which may have occurred. Their acts operated as representations to third persons that the alleged forger had an assignable interest. When one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it.

Barry v. *Heider*, 19 Commonwealth Law Reports 197.

Great West Permanent Loan Co. v. *Friesen*, 4 D. L. R. (1924) 980.

XVI.

Assuming that the decision of the Supreme Court of Illinois that petitioners have been deprived of their property by their own acts was incorrect, since appellants have had a fair trial on that issue in the Circuit Court of Cook County and the Supreme Court of Illinois, they have not been deprived of their property without due process of law.

Bonner v. *Gorman*, 213 U. S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709.

Tracy v. *Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755.

Davidson v. *New Orleans*, 96 U. S. 97.

Central Land Company v. *Laidley*, 159 U. S. 103.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575.

XVII.

The defendants in this case are not basing their rights on a certificate of title issued on a forged deed. They are basing their claim on a certificate of title issued on a genuine deed signed, sealed, acknowledged and delivered by the holder of a genuine certificate of title. Even though the prior certificate of title was based on a forged deed, it may act as a good root of title in the case of a bona fide purchaser.

Brown v. *Broughton*, 31 Western Law Reporter (Manitoba) 583.

Gibbs v. *Messer* (1891) A. C. 248.

Kateneth Whakaruru et al. v. *The Public Trustee et al.*, 12 New Zealand Law Reports, 651.

XVIII.

Appellants are bound by the provisions of the Torrens Act.

Cooley's Constitutional Limitations (8th Ed.), Volume 1, page 368.

12 C. J. 769, Sec. 190, 191.

United Fuel Gas Co. v. *Railroad Commission,* 278 U. S. 300, 307, 73 L. Ed. 104, 106.

St. Louis Malleable Casting Company v. *George C. Prendergast Construction Company,* 260 U. S. 469, 67 L. Ed. 351, 43 Sup. Ct. Rep. 178.

Hurley v. *Commission of Fisheries,* 257 U. S. 223, 66 L. Ed. 206, 42 Sup. Ct. Rep. 83.

Shepard v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, 24 Sup. Ct. Rep. 737.

Wight v. *Davidson,* 181 U. S. 371, 21 S. Ct. 616, 45 L. Ed. 900.

Wall v. *Parrott Silver & Co.,* 244 U. S. 407, 61 L. Ed. 1229, 37 Sup. Ct. Rep. 609.

Bartlett Trust Co. v. *Elliott,* 30 Fed. (2nd) 700.

Baker v. *Braman,* 6 Hill (N. Y.) 47.

Taylor v. *Porter* (4 Hill, 148).

Rusch v. *John Duncan Co.,* 211 U. S. 526, 43 L. Ed. 312, 29 Sup. Ct. Rep. 172.

XIX.

Appellants' remedy is against the indemnity fund.

White v. *Ainsworth,* 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918 E. 179.

Jones v. *York County,* 26 Fed. (2nd) 623, (U. S. C. C. A. Neb.).

Shevlin-Mathieu Lumber Co. v. *Fogarty,* 130 Minn. 456, 153 N. W. 871.

Ashton-Jenkins v. *Bramel,* 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.

ARGUMENT.

I.

Law of state controls.

In discussing the question whether any section of the Torrens Act of Illinois violates any provision of the Federal Constitution, we must start with the assumption that the act is valid unless its provisions are so arbitrary and unreasonable that they run counter to some inhibition found in the Federal Constitution. In this case it is claimed by the appellants that certain provisions of the Torrens Act of the State of Illinois violate the provisions of the Fourteenth Amendment to the Constitution of the United States. The Torrens Act of Illinois is entitled, "An Act concerning land titles," something which has always been held to be peculiarly a matter of state concern only.

In *Arndt* v. *Grigg*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. Ed. 918, the Supreme Court of the United States said:

> "The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts. In *United States* v. *Fox*, 94 U. S. 315, 320, it was said: 'The power of the State to regulate the tenure of real property

within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

Many other decisions of the Supreme Court of the United States might be cited to the same effect, and a number of cases along the same line are cited in point I of this brief.

The same holding was made by the Supreme Court of Illinois in the very first case in which a Torrens Act was held constitutional in the United States.

People v. *Simon,* 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

In that case the Supreme Court of Illinois said:

"It is further insisted, that by proceedings subsequent to the initial registration an owner may be deprived of his property without due process of law. In the consideration of this point it must be remembered that the right to alienate or inherit property is always dependent upon the law. So long as vested rights are not disturbed the law may at any time change the tenure upon which land is held, and may alter the conditions under which it may be alienated and modify the rules of evidence by which the title is to be determined. The true theory of this act, as we understand it, is, that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that *thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed.* 'A State may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise or alienation.' (3 Washburn on Real Prop., 4th ed., p.

187.) 'The right of ownership which an individual may acquire must therefore, in theory, at least, be held to be derived from the State, and the State has the right and power to stipulate the conditions and terms upon which the land may be held by individuals.' (Tiedeman on Real Prop., 2d ed., sec. 19.) 'The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.' (*Arndt* v. *Grigg*, 134 U. S. 316, on p. 321.) 'The power of the legislature in this respect, [as to changing the rules of evidence as to the burden of proof,] whether affecting proof of existing rights or as applicable to rights subsequently acquired or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, is practically unrestricted.'"

Gage v. *Caraher*, 125 Ill. 447, on p. 455:

"It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, we see no reason why the transfer of real estate may not be made in the way contemplated, and why it may not be made compulsory to make it in that way, if the legislature so determines."

People v. *Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States said:

"As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government."

II.

State Has Power of Classification.

In *Barbier* v. *Connolly*, 113 U. S. 27, the Supreme Court of the United States said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for

these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, *but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.*"

The foregoing words were again quoted with approval in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685.

See also:

White River Lumber Co. v. *Arkansas*, 279 U. S. 692, 49 Sup. Ct. Rep. 457, 73 L. Ed. 512.

Stebbins v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884.

Joslin Co. v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107.

Chicago Dock Co. v. *Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022.

Field v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

III.

Torrens System introduces classification of property within state.

With the introduction of the Torrens system in any state there necessarily is a division at once of all the land in the State into two classes. The first class consists of all real property, the title to which is registered under the provi-

sions of the Torrens act. The second class consists of all real property, the title to which is not registered under the Torrens act. *Evans* v. *Chicago Title & Trust Co.*, 317 Ill. 11, 147 N. E. 412. Such a classification necessarily arises from the presumed intention of the legislature, but it is now also found in statutory provisions other than the Torrens act itself.

See:

Chapter 109, Cahill's Ill. Rev. Stat. (1929), Plats, Secs. 2, 9.

Chapter 82, Cahill's Ill. Rev. Stat. (1929), Mechanic's Liens, Sec. 24.

Chapter 77, Cahill's Ill. Rev. Stat. (1929), Judgments, Sec. 1.

Chapter 41, Cahill's Ill. Rev. Stat. (1929), Dower, Sec. 10.

Chapter 38, Cahill's Ill. Rev. Stat. (1929), Criminal Bail, Sec. 640.

Chapter 37, Cahill's Ill. Rev. Stat. (1929), Courts, Sec. 456.

Chapter 32, Cahill's Ill. Rev. Stat. (1929), Trust Co. Deposits, Sec. 351.

Chapter 30, Cahill's Ill. Rev. Stat. (1929), Certification of Abstracts, Secs. 154, 157.

In the judgment act of Illinois (Cahill's Illinois Revised Statutes, 1929, Ch. 77), Section 1 provides:

> "With respect to the creation of liens on real estate by judgments of courts of record, all real estate in the State of Illinois shall be and is hereby divided into two classes.
>
> The first class shall consist of all real property, the title to which is registered under the provisions of 'An Act concerning land titles,' approved May 1, 1897, as subsequently amended.
>
> The second class shall consist of all real property not registered under the provisions of 'An Act concerning land titles,' approved May 1, 1897, as subsequently amended."

This classification of all property in the State of Illinois in the two classes—registered and non-registered property— has been held constitutional by the Supreme Court of Illinois.

In *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412, the Supreme Court of Illinois said:

> "The Torrens Law * * * simply introduces a classification of property. The law is a general law which the legislature had power to pass and does not interfere with the uniform enforcement of the process of all courts of record in the State. So far as land which has not been registered under the Torrens law is concerned, the judgments of all circuit courts in the State are liens upon all lands in the county not registered under the Torrens law. All may be made liens on land registered under the Torrens law by the same process of filing a certified copy of the judgment or a certificate of the clerk of the court in which it was rendered, stating its date and purport. The proceeding is the same whether the judgment is rendered in Cook County or any other county in the State. The appellee's only objection to this is that the Torrens law is not effective in any other county in the State than Cook and that the difference of the manner in which the title is evidenced is not a rational basis for classification with reference to the process of executing judgment. It is clear from what has been said that the classification of property for the purpose of subjecting it to the execution of judgment is justified. Since the tenure of land, the conditions of its alienation and the modes of its acquisition and transfer may be regulated by the legislature, it was a legislative question as to whether the change in the law evidenced by the Torrens law should be made. It was made by a valid law, and the legislature in the exercise of its power decided that the new system concerning land titles required a different process for executing judgments from that prevailing under the old system. The clearly indicated intention of the legislature was to provide that the registrar's certificate of title should be conclusive evidence of the holder's title, and that for this purpose no judgment should affect registered land until a certificate or certi-

fied copy of the judgment should be filed in the office of the registrar and a memorial entered upon the register of the last certificate of title to be affected. The basis of this classification is not purely arbitrary. It arises out of the difference of the two systems of registration, the one being a registration of the various instruments affecting the title, the other of the registration of the title itself. The difference in the manner in which the title is held may not be as great as the difference between personal property and real property, but we cannot say it was not sufficient to justify the legislature in accepting it as a basis for requiring different proceedings to establish the lien. If classification was proper the legislature had authority to determine upon what differences the distinction might be made between objects having some resemblance, and it is only where it is palpable that the power has been arbitrarily exercised that the courts can interfere. In our judgment the distinction between registered land and unregistered land is a reasonable basis of distinction, and the sections in question do not violate section 29 of article 6 of the constitution."

IV.

Purpose of Torrens System.

Since the Torrens system of land title registration originated in Australia and from thence spread through the British Colonies, and our Torrens acts are modeled on the Australian, English, New Zealand and Canadian acts, it is obvious that the construction of those acts and the statement of their purposes by their courts would, under well known rules of law, be binding upon the construction of American Torrens Acts unless there is some special provision contrary thereto either in the State or Federal Constitutions.

In the very latest work on the Australian Torrens System (Kerr's Australian Lands Titles (Torrens) System, p. 165, Sections 310-314), it is said:

"One of the cardinal objectives of the Torrens System is to facilitate the proof of title to estates in land. It was of the very essence of the scheme designed by Torrens that henceforward the mere presence of the document of title in the Register Book should prove such title to all the world and against all the world. Therefore, every bona fide purchaser without notice can rely absolutely on the title appearing in the Register Book, and, on becoming registered in respect of such title, cannot be defeated in his purchase, notwithstanding whatsoever flaws there may have been in the title of his vendor. In Australia, New Zealand, those Provinces of Canada, and other places that have adopted the Torrens System, the saying of Lord St. Leonards no longer holds true: 'No one's misfortune is so much slighted by the courts as his who buys a thing in the realty and does not look into the title.' Where the Torrens System prevails the buyer of realty without notice of any outstanding rights in third persons need not look into the title at all beyond what the Register Book shows to him and all the world. It is incumbent, however, on such buyer of realty to satisfy himself as to the identity and capacity of his seller. It is, after all, but a rule of common sense that if 'A' proposes to buy land of which 'B' appears in the Register Book to be the registered proprietor, 'A' must satisfy himself that he is dealing with 'B,' and not with 'Z' a forger; although, if perchance, 'B' neglects this precaution, and becomes registered, then 'C,' notwithstanding the forgery, can acquire from 'B' an indefeasible title, if 'C' purchases and becomes registered in good faith and ignorance of the facts."

"This indefeasibility of title is achieved by a series of provisions in the respective Torrens Statutes":

(a) "Judicial notice is to be taken of instruments and entries purporting to be authenticated by the Lands Titles Office."

(b) "The person named in or appearing by any certificate or other registered instrument as taking any estate or interest in land is declared to be the registered proprietor thereof."

(c) "The title of such registered proprietor is further declared to be indefeasible (except in case

of fraud), subject to the qualifications noted on such title, and to certain specified statutory qualifications, and this notwithstanding either the existence in the Crown or other person of any estate or interest, which but for the Torrens Statute might have been held to be paramount, or any irregularity in any application or proceedings."

(d) "(Subject to the exception of the case of fraud and the last-mentioned qualifications) every certificate issued by the Registrar is conclusive evidence that the person named in such certificate is entitled to the estate or interest specified therein."

(e) "Every such certificate is likewise conclusive evidence that the estate or interest so specified therein is under the provisions of the Torrens System."

(f) "No registered transferee, mortgagee, encumbrancee, or lessee acquiring bona fide for value is to be exposed to an action of any sort on the ground that the proprietor, through or under whom he claims, or any previous proprietor, has been registered through fraud or error of any description."

"The relationship of these provisions to the general scheme of the Torrens Statute is thus explained in *Gibbs* v. *Messer*, (1891) A. C. 248, 60 L. J. P. C. 20.

"The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. * * * The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right

from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. * * * Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed."

To the same effect *Brown* v. *Broughton*, (1915) 8 W. W. R. 889, 31 W. L. R. 583, 25 Man. R. 489. (Holding that a bona fide purchaser dealing with a registered owner takes good title, notwithstanding the registered owner obtained his certificate by a forged deed.)

To the same effect *Fialkouski* v. *Fialkouski*, (1911) 1 W. W. R. 216, 19 W. L. R. 644, 4 Alta. L. R. 10.

The general purpose of the American Torrens Acts may be gleaned from the following American decisions:

"The object of the act," said the Supreme Court of California in holding the California Torrens Act constitutional, "is well stated in the title. It purports to establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested, and to provide that, after the original registration, transfers of the land may be made in the manner prescribed in detail in the act. As a foundation for the system it is necessary to have the title established. To that end a proceeding is authorized whereby such title may be settled and declared by a decree of the superior court. The title, thus established, is to be certified by the county recorder, and the certificate is made conclu-

sive evidence of title in the person therein named as the owner." (*Robinson* v. *Kerrigan*, 151 Cal. 40, 80, Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829.)

"An act framed pursuant to such a purpose," the court again said in speaking of the benefit derived by the owner of land registered under the Torrens Act, "would lead to the issuance of a certificate of title worth having, one which would vouch to the world that the holder was the owner of the land described in it, that a merchantable title was vested in him. A statute framed without such an end in view would be of but scant value. It is to be remembered that the law, according to its title, is not purposed merely for the certification of land titles. It is also designed to provide for the simplification of the transfer of real estate and no considerable simplification results in such transfers if after obtaining a decree of the superior court that he has title to property and obtaining a certificate to that effect, one who has resorted to the procedure sanctioned by the law is compelled afterward to contend for additional decrees to secure to him a title which a buyer would accept on the market." (*Frances Inv. Co.* v. *Superior Court in and for Imperial County*, 189 Cal. 107, 208 Pac. 105.)

The California District Courts of Appeal have followed the Supreme Court of California in their decisions. In one case it was said that the act provided a complete scheme of procedure whereby, through a decree of the court, land may be brought under the operation of the act. "So that an intending purchaser, lessee, or mortgagee, or other person having dealings with the property, may go to the registrar's office, examine the leaf whereon the title to that property is registered, and at once, with safety, take a deed, lease, or mortgage from the owner of the property, file it, and have himself accordingly registered upon the leaf or folium

as owner, lessee, or mortgagee." (*In re Seick*, 46 Cal. App. 363, 189, Pac. 314.)

In *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412, the Supreme Court of Illinois said:

> "The purpose of the Torrens law was to provide a system of registration of land titles by which all instruments affecting the title should be filed and registered with one officer, who should be authorized to make a certificate of the title and show conclusively the state of the title and the person in whom it was vested, so that by a mere reference to the certificate the title to the land might be ascertained. A previous act of the legislature intended to accomplish the same purpose, passed in 1895, was held unconstitutional on the ground that it conferred judicial powers upon the registrar of titles. (*People* v. *Chase*, 165 Ill. 527.) The act here in question was attacked for the same reason and others, but it was held not subject to the objections made to it and to be a constitutional exercise of legislative power. (*People* v. *Simon*, 176 Ill. 165.) It was there held that so long as vested rights are not disturbed the legislature has the power to regulate the tenure of land within the limits of the State, the conditions under which it may be alienated, the modes of its acquisition and transfer, and the rules of evidence by which the title is to be determined. 'The true theory of this act,' it was said, 'as we understand it, is, that all holders of vested rights shall be subjected to an adjudication in a court of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and incumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules now prescribed.' It was held that there was no reason why the transfer of real estate might not be made in the way provided by the act or why the legislature might not have chosen to make that way compulsory. It was not made compulsory, however, but it was left to the voluntary action of owners of real estate whether their lands might be brought under the act, and it was left to the action of the voters of each county whether the act should be effective in the county. The act was adopted in Cook County and

has ever since been in force in that county and a large amount of real estate has been registered under the act, but it has never been adopted, and is therefore not in force, in any other county."

The Supreme Court of the State of Massachusetts has succinctly said:

"Proceedings in the land court are judicial in nature. * * * The purpose of registration law is to bind the land and to quiet title to it. Registration is conclusive upon everyone, with a few exceptions not material to the issues in this case, and the rights of innocent purchasers for value are given special protection." (*Malaguti* v. *Rosen*, 262 Mass. 555, 160 N. E. 532.)

In an early leading case, the Supreme Court of Minnesota said:

"The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. Necessarily the initial registration of the title—that is, the conclusive establishment of a starting point binding upon all the world—must rest upon judicial proceedings." (*State ex rel. Douglas* v. *Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; *Henry* v. *White*, 123 Minn. 182, 143 N. W. 324, L. R. A. 1916 D 4.)

In another case the court said:

"We think the purpose of the statute was to create an indefeasible title in the person adjudged to be the owner, and who thus becomes the original registered proprietor. In the absence of fraud, the decree is final, unless reversed or modified as authorized by the statute. The instruments produced at the hearing to establish the applicant's title are evidence upon which the court is required to act, and its conclusion, as embodied

in the decree, is conclusive." (*Baart* v. *Martin,* 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.)

The first opinion above cited was later commented on as follows:

"In the opinion of the Chief Justice in that decision will be found an accurate statement of the purpose of the law, as well as a summary of the essential processes through which the legislature sought to attain in the transfer of lands a more reliable certainty and confidence than had previously been known, so that a purchaser of real estate could be assured by the last registered transfer that the title was in the apparent record owner. This is to be accomplished by providing that the proceedings shall be conducted under the authority of a court having jurisdiction of the subject matter, instituted upon the voluntary application of the party desiring registration, who must give due notice to all parties interested in the land. A hearing by the court is provided for, and judgment is to be entered after hearing. The scheme thus seeks to embrace all the constituent elements of due process of law, and thereby obtains the desired results without depriving any one of vested rights." (*Reed* v. *Siddall,* 94 Minn. 216, 102 N. W. 453.)

A more recent case contains the statement that:

"The purpose of the registration act is to insure to the one to whom a certificate of title is issued, and to his vendees, an absolutely perfect and indefeasible title, free from all claims of every kind and nature except those expressly noted upon the certificate, and to put such title beyond attack. A subsequent purchaser has the right to rely upon such certificate as an assurance that the court which decreed its issuance had jurisdiction of the subject matter of the title, and that the holder thereof possesses a title which the law authorized to be registered." (*Shevlin-Mathieu Lumber Co.* v. *Fogarty,* 130 Minn. 456, 153 N. W. 871.)

"The statutes of the several states which have adopted the principle of the Torrens land law," said the Supreme Court of Utah, "are strikingly similar. They all have a common purpose. As stated in 3 Devlin, Real Estate (3rd Ed.) Section 1439, 'The object

is to secure the evidence of title exclusively by a certificate issuing from public authority;' or, as stated by the court in *State ex rel. Douglas* v. *Westfall*, a Minnesota case, 85 Minn. at page 439, 89 N. W. at page 175, 57 L. R. A. at page 299 (89 Am. St. Rep. 571), 'The basic principle of this system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title.' A more terse statement, and one perhaps equally clear, is that contained in defendant's brief. 'Its essential point is an official guarantee of title.' Under the old system a deed absolute on its face is only one link in the chain of evidence by which the holder must establish his title. Under the Torrens system and statutes modeled thereon the registered certificate is conclusive evidence of the holder's title. It imports the sanctity of a final adjudication of a court of competent jurisdiction. This is the ultimate purpose of the statutes." (*Ashton-Jenkins Co.* v. *Bramel*, 56 Utah 587, 192 Pac. 375, 11 A. L. R. 752.)

In the State of Washington the Supreme Court of that State has said that it is the "obvious purpose of the Torrens act to create an absolute presumption that the certificate of registration in the registrar's office at all times speaks the last word as to the title, thus doing away with secret liens and hidden equities. This is accomplished by the simple plan of making the act of conveyance and the fact of notice by record simultaneous in performance and effect. The Torrens system makes this simultaneous quality inevitable by making both conveyance and notice of record performable, and performable only, by the one act of registration. This is the distinctive feature, the vital principle of the Torrens system. It is the very essence of the plan. For the courts to refuse to recognize and enforce it would be to emasculate the law and, by construction, make it not the Torrens system of land titles, but a mere change in the *form* of the record, a mere modification of the recording act." (*Brace* v. *Superior Land Co.*, 65 Wash.

681, 118 Pac. 910; *McMullin & Co.* v. *Croft,* 96 Wash. 275, 164 Pac. 930, reversing on rehearing 92 Wash. 411, 159 Pac. 375.)

V.

Torrens Acts should be liberally construed to effect certainty against the unknown.

The leading Torrens case in the United States as to unknown claimants under the Torrens Acts is *Tyler* v. *Judges of Court of Registration,* 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, writ of error denied, 179 U. S. 405, 21 Sup. Ct. 206, 45 L. Ed. 252. It has been quoted repeatedly.

In *American Land Co.* v. *Zeiss,* 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States, quoting, approved the following words of the Supreme Court of California:

> "The power of the State as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent, it is necessary that it should be made to operate on all interests, known and unknown. As was said by Holmes C. J., in *Tyler* v. *Judges of the Court of Registration,* 175 Massachusetts 71, in speaking of a statute which, in the particular under discussion, was similar to ours: 'If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant.'"

In *Crowell* v. *Akin,* 152 Ga. 126, 108 S. E. 791, 19 A. L. R. 51, the Supreme Court of Georgia said:

> "The object of the land-registration acts will be further noticed in a subsequent division of this opinion; but it will be helpful to call attention at this point to some of the essentials of title to land nowhere to be

discovered of record under the system of evidencing title heretofore existing in this State. Among these were: the genuineness of signatures of grantors and of attesting witnesses in recorded deeds; jurisdiction and authority of official witnesses; status and identity of persons professing to be heirs at law; full age of grantors and donees; sanity; the fact and validity of marriage and divorce; prescription; adverse possession; the power and authority of corporate officers; the validity of tax deeds (depending upon whether the levy was excessive, etc.). Other illustrations might be given. The land-registration act is therefore a remedial statute and should be liberally construed 'according to its intent, so as to advance the remedy and repress the evil.'"

This liberality of construction is required by the statute itself in Illinois for Section 109 of the Torrens Act (Cahill's Illinois Revised Statute, 1929, Ch. 30, Sec. 151) provides:

"This act shall be construed liberally so far as may be necessary for the purpose of affecting (effecting) its general intent."

VI.

Under Torrens laws the act of registration by the Registrar is the operative act to convey or affect land.

It has been aptly said that the estate conferred by registration under the Torrens System is neither the common law legal estate, or seisin, nor the statutory seisin of the Statute of Uses, nor the equitable estate of English equity jurisprudence, but a new statutory estate; a registered estate (Hogg's Australian Torrens System, p. 766):

"The most logical view to take, of the relation between the legal estate of the general law and this registered estate, is that the legal estate is not exchanged for the new statutory estate, but that it either remains in the first registered proprietor—where he actually has it—notwithstanding all subsequent transactions

with the land, or, if not vested in the registered proprietor, is left outstanding altogether, and in either case, unless turned into an equitable right, becomes nugatory so far as any practical rights are concerned. With the disappearance for practical purposes of the legal estate disappears also all necessity for any common-law seisin, the formality of registration being, in fact, substituted for seisin or possession. In a sense the former owner's fee-simple may be said to have become vested in the registered proprietor, but this appears to be even less accurate than to say that by virtue of the Limitation Acts the fee-simple of the person who is barred by twenty years' possession of an intruder is vested in that intruder. The relation, in fact, between the rights of a person who has occupied land for the statutory period under a Limitation Act, and the person in whom the legal fee-simple is vested by documentary title, is closely analogous to the relation which exists between the statutory fee-simple conferred by due registration under the Torrens System, and an outstanding legal estate in fee-simple which is not recorded in any way on the register. In each case the owner of the 'legal estate' of the general law has for all practical purposes lost his property in the land; in each case the new owner has statutory rights which are undistinguishable, in point of practical value, from the 'estate' of the former owner, and are cognizable in the courts as identical with or equivalent to the most complete rights of property allowed by the law—in other words, the new owner has a new 'estate in fee-simple.'" (Hogg's Australian Torrens System, pp. 769-770.)

The Torrens System is not in effect a departure from the common law method of dealing with titles to real estate. It is the outcome of a long continued struggle to return to the "single estate" system which prevailed in England before the development of uses by the court of chancery. There were five methods of conveying real property at common law: First, by livery of seisin; second, by deed; third, by parol or by parol and entry; fourth, by record; fifth, by special custom.

Conveyances by special custom seem to have been confined to copyhold estate, and were ancient forms by which the tenant surrendered the tenements into the hands of the lord to the use of the grantee. And when this was done the lord was said to have "admitted" the new tenant, and that the old tenant had "surrendered" the tenement to the lord. A most valuable analogy may be made between the system of copyholds in England and the Torrens Systems. If a precedent is needed in the common law for the Torrens System under our due process of law constitutional provisions, that precedent may be found in the English system of copyholds. (Hogg's Australian Torrens System, p. 780.)

The registered estate created by a Torrens Act is necessarily legal in the sense that courts both of law and equity are bound to recognize and give effect to it. It is a statutory right which is none the less a right of proprietorship because it may be qualified as to the mode of disposing of or using the property. (Hogg's Australian Torrens System, p. 769.)

The fact that deeds or other instruments of conveyance which have been long in use as a means of dealing with non-registered property may be permitted under certain restrictions to be used as a method of initiating a transfer of title under the Torrens Act does not mean that those deeds or other instruments of conveyance have like effect under the Torrens Act as they have with non-registered property.

> "Under the Torrens System instruments are merely vehicles for obtaining registered title, and, when once registered, all defects therein, so far as subsequent purchasers are concerned, are cured, whereas under the recording system the deeds remain the essential links in the chain, and the recording of such deeds does not cure inherent defects therein. In other words, under the Torrens System an intending purchaser may ig-

nore preceding instruments altcgether, relying solely on his vendor's certificate of title. Under the registration of deeds statute he has, as under the common law, to look to the preceding instruments themselves." (Kerr's Australian Lands Titles (Torrens) System, p. 13.)

The effect of any deed or other instrument dealing with registered land is dealt with in Section 54 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 102), as follows:

> "*A deed,* mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding five years where the land is in actual possession of the lessee or his assigns, *shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register* the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this act. *On the completion of such registration,* the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."

Section 47 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 95), provides:

> "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, *may execute* to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. *And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferer has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the*

> *transferee has the right to have such estate or interest transferred to him,* he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled.'"

Section 52 of the Illinois Torrens Act (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Sec. 100), provides:

> "Like forms of deeds, mortgages, leases or other instruments as are now or may hereafter be sufficient in law for the purpose intended, *may* be used in dealing with registered land in any estate or interest therein."

In other words, although like forms of deeds *may* be used under the Torrens System as under the old recording system, *the effect of their use is totally different.* Nor is the use of a deed the *only* method of obtaining a registered title.

In their briefs appellants have based their entire argument upon the claim that the Registrar of Titles can only act upon a deed or other written instrument executed by the registered proprietor, and have asserted that if such deed or other instrument was a forgery, any subsequent act of the Registrar of Titles, *no matter what the circumstances may be,* is void.

The fact that appellants are acting upon a wrong theory is illustrated both by the Illinois Torrens Act and by cases which the appellants have themselves cited.

One patent illustration in the act is found in that the Illinois Torrens Act provides not only for transfers but for transmissions.

"The distinction between 'transfer' and 'transmission' is rather practical than theoretical. Theoretically the two should stand for operations which are much of the same kind. Practically 'transfer' is applied to cases where an interest is vested in a new proprietor by means of the presentation and immediate registration of a statutory instrument—*i. e.*, one in prescribed form—executed by the transferring proprietor; 'transmission,' to cases where the new proprietor gets on the register by presenting—not a statutory instrument, but—evidence of a general kind that he is entitled to be placed on the register in place of another proprietor, whose name must be removed from the register to make way for him. In the case of 'transfer' the production of a statutory instrument duly signed and witnessed is usually sufficient warrant for the entry forthwith of the new proprietor on the register; in the case of 'transmission' the evidence produced is usually scrutinized with more or less care, and the entry of the new proprietor is not so much a matter of course. The result of both operations is by registering, in one case, the statutory instrument, and in the other by registering—not any particular instrument, but—the person who claims to be entitled. In each case the person entitled becomes the registered proprietor." (Hogg's Australian Torrens System, p. 895.)

Examples of "transmissions" rather than "transfers" under the Torrens System would be such things as bankruptcy, insolvency, joint tenants becoming entitled by right of survivorship, sales under attachment or execution, transmission by will or intestacy, etc. A mere statement of such cases is sufficient to disprove the assumption of appellants that the Registrar of Titles cannot or must not act without the consent of the former registered proprietor. The Registrar of Titles is not only entitled to act, but in some cases must act, on evidence of a general kind that a person is entitled to be placed on the register in place of another proprietor.

Thus in the matter of a joint tenancy of husband and

wife, on the death of the husband it has been held that the fee vested in the wife, as survivor of the joint tenants, upon the husband's death, by operation of law, and even though the survivor did not file with the Registrar of Titles a memorial of the death of one of the joint tenants, the death could be proved in the petitioner's proceeding to remove the memorial of a judgment against the deceased joint tenant. (*Peoples Trust and Savings Bank* v. *Haas,* 328 Ill. 468, 160 N. E. 85.)

So also in the case of *Hooper* v. *Haas,* 332 Ill. 561, 164 N. E. 23, cited on page 24 of appellant's brief, the Supreme Court held that in a proceeding against the Registrar of Titles to have a certificate of title issued on a sheriff's deed, the grantee of the sheriff's deed took only the interest of the judgment debtor charged with whatever equities existed against him, and in that proceeding the Village of Riverside was able to prove the dedication of part of the property as a public street although the dedication had never been registered, and the Registrar of Titles was ordered to issue the certificate of title to the grantee under the sheriff's deed subject to such easement so proven.

So also Sections 70, 71 and 72 of the Torrens Acts of Illinois (Cahill's Illinois Revised Statutes, 1929, Ch. 30, Secs. 118-120) provide for transmission by will or intestacy on the death of the registered proprietor.

It is thus apparent, without further citation of instances, that a deed or other written instrument of conveyance is not the only method of procuring registration by the Registrar of Titles.

Yet in every case the registration by the Registrar of Titles whether on a transfer or transmission is the operative act which places a new person in the position to deal with the title as the registered proprietor.

In the late Canadian case of *Dobek* v. *Jennings* (1928), 1 D. L. R. 736, the court said:

> "The principle of the Act is that a person may ascertain the state of the title by a reference to the records of the Land Titles Office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a bona fide purchaser subject only to what appears on the register and the reservations and exceptions of s. 57. *It is registration that gives or extinguishes title.* A right or interest without title may be protected by caveat but without such protection it may be lost entirely. This has been declared in frequent decisions."

The wording of the various Torrens Acts may differ in the United States, but the central idea of all of them remains the same that the act of registration is the operative act to convey title. In some statutes the exact words have been used.

Thus in *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the Court said:

> "*The act of registration is the operative act to convey title*, Sec. 50; and by the act of 1898, the assistant recorder does it unless in doubt. Sections 53, 55, 57, 58, 61, 62, 63. It is said that as his decision affects title it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision. Sec. 53. But whatever may be thought of the original act, by amendment even the ordinary business is to be done only 'in accordance with the rules and instructions of the court.' St. 1899, c. 131, Sec. 8. Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a

general order or rule of the Superior Court. It should be observed that by Sec. 55 the production of the owner's duplicate certificate whenever any voluntary instrument is presented for registration is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate, etc., is void."

So in the late case of *In re Juran,* ..... Minn. ....., 226 N. W. 201, the Supreme Court of Minnesota said:

"The purpose of the Torrens Law is to establish an indefeasible title free from any and all rights or claims not registered with the registrar of titles, with certain unimportant exceptions, to the end that any one may deal with such property with the assurance that the only rights or claims of which he need take notice are those so registered. The law was framed to accomplish that purpose; and it establishes rules in respect to registered land which differ widely from those which apply in the case of unregistered land. It provides that the holder of a certificate of title of registered land 'shall hold the same free from all incumbrances, and adverse claims, excepting only' those noted on the last certificate of title and certain other specified rights or claims not important here. Mason's Minn. Stat. 1927, 8271. It declares: 'No voluntary instrument of conveyance purporting to convey or affect registered land, except a will, and a lease for a term not exceeding three years, shall take effect as a conveyance, or bind or affect the land, but shall operate only as a contract between the parties, and as authority to the registrar to make registration. *The act of registration shall be the operative act to convey or affect the land.*' Mason's Minn. Stat. 1927, 8293. The next section provides that all instruments of every kind and nature purporting to affect the title 'shall be notice to all persons from the time' they are registered with the registrar. The deeds under which plaintiff claims and the contract under which the Frieds claim were not registered, and therefore, by force of the statute, they had no effect on the title and created no rights in the land."

So also it has been held that possession of real estate taken after the title thereto has been duly registered is not notice of any rights therein to one who is a good faith purchaser for value.

Sterling National Bank v. *Fischer*, 75 Colo. 371, 226 Pac. 146.

Bjornberg v. *Myers*, 212 Ill. App. 257.

In re Abrahamson v. *Sundman*, 174 Minn. 22, 218 N. W. 246.

In the latter case, the Supreme Court of Minnesota said:

> "No contract or deed concerning registered land can take effect as a conveyance, or bind or affect the land except as authority to registrar to make registration. '*The act of registration shall be the operative act to convey or affect the land.*' *Section 8293.* A Torrens title being created by a decree of court and protected by statute so that no one may thereafter acquire any right, lien, or interest therein by or through possession or occupation, no reason is apparent for making the occupant, who by no memorial or notation upon the certificate of registration is connected with the title, a party defendant in any action foreclosing a mortgage or mechanic's lien duly registered."

It is true that in four states, as stated on page 14 of appellant's brief, there are express provisions of the statutes relating to the effect of forgery on a registration of title. The majority of the Torrens Acts in the various American states and territories, however, contain no such provisions as those cited. It is also very doubtful whether even in those states the courts would hold that a purchaser in good faith relying on the genuine certificate and the genuine deed from the holder of such certificate would not be protected. At best, the very fact that there is such an exception in those four states proves the generality of the rule that registration is the operative act to transfer title and the exceptions as to the conclusiveness of such registration must be found in the act itself.

In Kerr's Australian Lands Titles (Torrens) System, page 34, it is said:

> "Each entry on the folium of the Register Book of the fact of a transfer of the fee simple is, in effect, the issue of a new certificate of title to the transferee in respect of such fee simple; and is, moreover, in effect a fresh grant of land from the Crown. Upon a transfer of the fee simple to a transferee, the folium or certificate of title will be cancelled, if the transferee so desires, and a new folium created in respect of such fee simple, which new folium contains no record of previous transactions (other than existing mortgages, easements, reservations, and encumbrances), so that the transferee becomes possessed of a fresh certification by the Crown of his title to his estate in the land specified therein."

So in America under our American Torrens Acts on each registration by the Registrar of Titles it is in effect a new grant from the state and a certification under the authority of the state as to such new grant.

There is nothing new or startling in this theory. As previously stated, it is the old English copyhold method of transfer. So in private business today a man thinks nothing of having real estate in which he is interested held by a corporation, a partnership or a trust with the possibility that by the acts of those interested in or managing such corporation, partnership or trust he may ultimately suffer a loss. The immense growth of Massachusetts business trusts and the creation of immense industrial corporations shows the necessity of those comparatively modern methods of doing business. There is equally good reason for the existence of the Torrens System of land title registration in modern business life wherein the spectre of unknown claims is not constantly arising, and the action of one man can be final, provided sufficient safeguards are placed around the actions of that man. So also there is equally good reason for saying that, just as a man may enter into a corporation,

partnership, or business trust and thereby vest others with authority over his property, so he may *voluntarily* enter into an optional method of dealing with land titles inaugurated by the state in which a public officer designated by the state is empowered to act with reference to his property.

VII.

Conditions and requirements of act voluntarily assumed.

The effect of bringing land under the Torrens system in Illinois is succinctly stated in the opinion of the Supreme Court of Illinois in this case. A part of that opinion is as follows:

> "In determining whether the statute is unconstitutional its various provisions must be considered as a whole. The act is optional in the various counties of the State. It is not compulsory in any county and can only become operative by a vote of the people, as provided in section 110. After it has been adopted by a county it is not compulsory as to any person owning land in the county. No one is required to register his land unless he sees fit to do so. When an owner brings his land under the act he presumptively does so with notice of all of its provisions and requirements, including its rights, privileges and obligations. When he does voluntarily submit his land to the operation of the act he has no cause to complain that the act is unconstitutional. (*Victor Chemical Works* v. *Industrial Board*, 274 Ill. 11; *Dietz* v. *Big Muddy Coal Co.*, 263 *id.* 480; *Crooks* v. *Tazewell Coal Co.*, 263 *id.* 343; *Deibeikis* v. *Link-Belt Co.*, 261 *id.* 454.) Under Section 46, when land is registered there is an implied agreement, which runs with the land, that the same shall be subject to the terms of the act and to all amendments and alterations thereto. Upon the original application to register, the statute requires that all persons interested or in possession shall be made parties defendant; that there shall be personal service or service by publication on all defendants; that there shall be a full and

complete hearing, with ample opportunity to all parties to present and preserve their rights. Section 36 provides for the preservation with the registrar of the original certificate of title issued and the delivery of a duplicate certificate to the applicant. Section 37 provides for the preservation of the evidence of the handwriting of the holder of the duplicate certificate, and that his receipt therefor, in his handwriting, shall be prima facie evidence of the genuineness of his signature. After the hearing, if a certificate is granted, the effect of such certificate is specified in Sections 40 and 42 above noted."

"The land in this case was first registered in the names of the Haleys and a certificate was issued to them. When appellants bought it they knew the title had been registered, and they took it subject to all the rights, privileges and obligations of such registration and the law applicable thereto. They were under no obligations to buy, but when they did buy and registered their title they came under all of the provisions of the act and were presumed to know all of its terms."

Eliason v. *Wilborn*, 335 Ill. 352, 167 N. E. 101.

See also *Evans* v. *Chicago Title and Trust Co.*, 317 Ill. 11, 147 N. E. 412.

VIII.

Voluntary registration is the creation of new rights, not the waiver of future rights.

From a constitutional standpoint the bulwark of the Torrens system of land title registration is the voluntary nature of the initial land title registration proceeding.

In their brief appellants rest their entire arguments upon the assumption that an initial registration proceeding under a Torrens Act is an attempt to waive constitutional guarantees as to future transactions and dealings with the land, the title to which is registered. Nothing could be farther from the truth.

We have already seen that the enactment of a Torrens Act in a state introduces a new classification of property, and that in the State of Illinois that classification of property into registered and non-registered land has been held to be reasonable and constitutional.

On the one hand in the State of Illinois there is one great class of property which is still under the old recording system. There is another great class of property which is under the Torrens system. To deny that the legislature may create a new classification of property with new rights and liabilities and new methods of dealing with the same, where the inclusion of any particular property in such classification is dependent upon the voluntary action of the owner, is to deny the right of the state to change the older methods of dealing with real property and, on the other hand, to deny the owner of real property the right to deal with it as he sees fit.

The bringing of land under the act by voluntary act of the owner is a change from one class of property to another. It is the giving up of old rights and liabilities and the creation of new rights and liabilities. It is a permanent abandonment of an old method of dealing with property for a new method of dealing with property. The only rights under the newer system are registered rights. When a constitutional provision is invoked that constitutional provision must be read with reference to those registered rights and not with reference to the rights and liabilities as existed under the recording system.

Under the recording system the deed is everything; under the Torrens system the registration is everything. Any constitutional guarantee must be read with reference to those differences.

The right of the Registrar of Titles to act is fixed at the very moment of the decree of registration, and the decree

of registration in itself is but an order on the Registrar to exercise that right. It is a continuing right which runs as a covenant with the land, voluntarily assumed by the owner of the land at the time of registration. When exercised it cannot be said to be by virtue of a waiver of some constitutional guarantee; it is by virtue of the creation of his right to act in place of the owner by voluntary act of the owner in bringing his land within the new classification.

This was early recognized in a leading case in Massachusetts. In *Tyler* v. *Judges of Court of Registration*, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the Supreme Court of Massachusetts said:

> "Neither can such an act be held unconstitutional because there is no provision for notice before registration of transfers or dealings subsequent to the original registration. It must be remembered that at all later stages no one can have a claim which does not appear on the face of the register. *The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the legislature from fixing the conditions upon which it shall be held under that system.* Furthermore, in deciding whether substantial justice is done it is to be borne in mind that ordinary cases will present no question at all. It is contemplated that if there is a question to be discerned it shall be referred to the court, and of course that the court will order notice to any party interested. Such supplementary references to the court show an intent that no one shall be concluded without having a chance to be heard, and although such methods may be new, they cannot be held insufficient in form or substance on that account."

The words of the Supreme Court of Massachusetts in this case might well have been written concerning the Illinois Torrens Act, with respect to the reference of questions to the court as well as the rights created.

The essential point to be kept in mind as to appellants' contentions is that voluntary registration is the creation of

new rights under a new classification, and not the waiver in the future of rights which could only exist under the old classification and which were abandoned once and for all time by bringing the land under the Torrens Act.

Dealings subsequent to initial registration of land may be classified as voluntary and involuntary. Where the dealings are voluntary, as in the case of transfers, mortgages, leases, etc., the parties dealing with the land know or should know that the title has been registered, and they take it subject to all of the rights, privileges and obligations of such registration and the law applicable thereto. They are under no obligations to so deal with the land, but when they do so deal and register their right, title and interest they come under all of the provisions of the act and are presumed to know all of its terms.

Eliason v. *Wilborn,* 335 Ill. 352, 167 N. E. 101.

Where the dealings are involuntary, and adverse to title of the registered owner, as in the case of attachments, judgments, liens, etc., the party attempting to deal with the title of the registered owner stands in the shoes of the registered owner insofar as his right, title and interest is concerned. He finds the land as registered land, and if he wishes to subject the title of the owner to his adverse claim, he must deal with the land as he finds it and in enforcing his remedies is subject to all the provisions of the Torrens Act as to such remedies.

Hooper v. *Haas,* 332 Ill. 561, 164 N. E. 23.

IX.

Equal protection does not guaranty equality of operation.

The fact that all real property in the State of Illinois is divided into two great classes—registered and non-registered—does not mean that equal protection of the laws requires identical operation of the laws in both classes.

In *Stebbins* v. *Riley*, 268 U. S. 137, 45 Sup. Ct. 424, 69 L. Ed. 884, the Supreme Court of the United States said:

> "The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state. As was said in *Magoun* v. *Illinois Trust & Sav. Bank, supra*, at page 293 (42 L. Ed. 1042, 18 Sup. Ct. Rep. 594):
>
> " 'It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax "A" more than "B," but if "A" be of a different trade or profession than "B," it may. In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.' "

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 293, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037, the court said:

> "The clause of the Fourteenth Amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to

which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed."

Again in *Williams* v. *Walsh*, 222 U. S. 415, 32 Sup. Ct. Rep. 137, 56 L. Ed. 253, the court said:

"It is not necessary to do more than repeat what we have said many times, that a classification which is not arbitrary is not repugnant to the Constitution of the United States. We may add that 'the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus discriminate between the rights of an earlier and later time.' *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 505."

In *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, the Supreme Court of the United States said:

"It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed."

And in *Joslin Co.* v. *Providence*, 262 U. S. 668, 43 Sup. Ct. 684, 67 L. Ed. 1107, it was held that:

"A statute providing for the taking of land for public use does not deny the equal protection of the laws by granting the owner of any business on the land established prior to the passage of the act the right to recover for injury thereto, while withholding such compensation from those whose businesses have been established since." P. 675.

In the petition filed in this case there is not one word which would indicate that the same means and methods are not applied impartially to all the constituents of the class

of registered property nor is there one word in the petition to indicate that the Torrens law does not operate equally and uniformly upon all persons in similar circumstances.

X.

Mere error of judgment by Registrar of Titles is not a violation of the equal protection clause of the Fourteenth Amendment.

In *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154, the Supreme Court of the United States said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. * * * It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

In the petition filed in this case, if in fact, the Registrar of Titles acted upon a forged deed, which the Registrar of Titles does not admit, the most that can be claimed is an error of judgment on the part of the Registrar of Titles as to the genuineness of the signature to the deed. The certificate of title was admitted to have been genuine, the duplicate contract of sale signed by petitioners is admitted to have been genuine and only the deed is claimed to have been a forgery. There is not one word in the petition which would indicate intentional and arbitrary discrimination.

Assuming everything stated in the petition to be true, the most that can be claimed concerning it is that there was an error of judgment on the part of the Registrar of Titles as to the genuineness of the signature to the deed. This would not amount to a violation of the equal protection clause of the Fourteenth Amendment.

XI.

Due process clause does not render law incapable of progress or improvement.

The fact that the Torrens system of land title registration is a product of the last seventy-five years and is not in vogue in all of our states does not render the law unconstitutional, nor make it assailable under the due process clause of the Fourteenth Amendment. Courts are wisely setting their faces forward and not backward in the interpretation of the Fourteenth Amendment.

In *Tyler* v. *Judges of Court of Registration,* 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812, the court said:

> "The prohibition in the Fourteenth Amendment of the Constitution of the United States against a state depriving any person of his property without due process of law, and that in the twelfth article of the Massachusetts Bill of Rights, refer to somewhat vaguely determined criteria of justification, which may be found in ancient practice; *Murray* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 277; or which may be found in convenience and substantial justice although the form is new. *Hurtado* v. *People,* 110 U. S. 516, 528, 531. *Holden* v. *Hardy,* 169 U. S. 366, 388, 389. The prohibitions must be taken largely, with a regard to substance rather than to form, or they are likely to do more harm than good. It is not enough to show a procedure to be unconstitutional to say that we never have heard of it before. *Hurtado* v. *People,* 110 U. S. 516, 537."

In *Hurtado* v. *California*, 110 U. S. 516, at p. 528, the Supreme Court of the United States said:

"It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272. There Mr. Justice Curtis, delivering the opinion of the court, after showing, p. 276, that due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power, proceeds as follows:

> "'To what principle, then, are we to resort to ascertain whether the process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"This, it is argued, furnishes an indispensable test of what constitutes 'due process of law'; that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law."

"But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due

process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

XII.

Due process clause only restrains arbitrary and unreasonable exertions of power by state.

In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. Ed. 82, the Supreme Court of the United States said:

> "It is to be borne in mind that it has been settled (*Griffith* v. *Connecticut*, 218 U. S. 563, and cases cited) that the Fourteenth Amendment does not operate to deprive the States of their lawful power, and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

The criterion, therefore, of whether the provisions of a state statute are repugnant to the due process clause is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the matter deals.

XIII.

Due process does not forbid discretionary powers in Registrar.

Due process of law does not necessarily mean a judicial proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons similarly situated alike, is due process.

In *Dreyer* v. *Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79, the Supreme Court of the United States said:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th ed.) 393. Again: 'Indeed, there is not a single constitution of any State in the Union which does not practically embrace some acknowledgment of

the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th ed.) 395.

"The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due-process clause of the Fourteenth Amendment."

XIV.

The adequacy of the safeguards which the statute provides against wrongful acts or omissions of the Registrar.

Under the heading "the statute affords an owner no safeguard against the unlawful taking of his property," appellants would have this honorable court believe that an owner of Torrens property is liable at any time to lose his property through forgery, and that possession of the owner's duplicate certificate of title is the only safeguard provided which may be obviated by a forger obtaining a new certificate by a false affidavit.

Perhaps the best answer to make to this unwarranted assertion is the fact that since March 1, 1899, when the first certificate of title was issued by the Registrar of Titles of Cook County, there have been over 250,000 certificates issued and nearly 500,000 documents registered. In all that thirty-one years and with that number of certificates and documents there have been exactly three claims of forgery to date.

The first claim was made by a husband who asserted that his wife and nephew had forged his name to a deed, executed a mortgage and obtained the proceeds thereof, and disappeared. The Torrens office located the wife and nephew, had them indicted, and the husband then confessed that his signature was genuine, and the whole proceeding was intended to defraud the Torrens office.

The second proceeding was one involving the same man Napletone, who is claimed to be the forger in this case. The circumstances were claimed to be similar. On a trial in the Circuit Court of Cook County it was proved that the signature was genuine, and the matter was one of misplaced confidence on the part of the petitioner and not a forgery.

The third proceeding is the present case. The Registrar of Titles was not served in this case, but respectfully submits that even though the facts are admitted by demurrer, they show misplaced confidence and that the loss should fall on petitioners and not an innocent purchaser. The Registrar of Titles did not join in the demurrer and does not desire to admit that there was a forgery in this case, even though it must be argued as such from a standpoint of law.

In other words, in thirty-one years of actual practice, there has not been a case of forgery actually proved in the Torrens office, and the present case comes up on demurrer and not on facts actually proved.

There is a reason behind this record. That reason lies in the safeguards provided by the Torrens Act itself. We merely enumerate them because the words of the statute tell their own story.

(a) The certificate of title must contain identifying facts which will enable the Registrar to know that he is dealing with the proper party. Section 33 (Cahill's Ill. Rev. St., 1929, Ch. 30, Section 81), provides:

> "Every certificate shall bear date the day and year of its issue, and be under the hand and official seal of the registrar, and be numbered in the order of its issue. It shall state whether the owner (except in the case of a corporation) is married or not married, and if married, the name of the husband or wife. If the owner is a minor, it shall state his age, if under

any other disability, the nature of the disability. The registrar shall note at the end of the certificate, in such manner as to show and preserve their priorities, the particulars of all estates, mortgages, incumbrances and charges to which the owner's title is subject.

Section 56 (Cahill's Ill. Rev. St., 1929, Ch. 30, Section 104) also provides:

"Every certificate of title to land shall state whether the transferee (except when the latter is a corporation) is married or not married, and if married, the name of the husband or wife. The transferee shall furnish the registrar the necessary information before he shall be entitled to have the land transferred to him on the register."

(b) The handwriting of the owner is preserved for comparison with any deeds or other documents presented to the Registrar of Titles for registration. Section 37 (Cahill's Rev. Ill. St., 1929, Ch. 30, Sec. 85) provides:

"For the purpose of preserving evidence of the handwriting of the owner in his office, it shall be the duty of the registrar to take from the owner, in every case where it is practicable so to do, his receipt for the certificate of title, or whatever paper shall be issued to him, signed by the owner in person. When such receipt is signed in the registrar's office it may be witnessed by the registrar or some deputy. If signed elsewhere it may be acknowledged before any officer authorized to take acknowledgment of deeds. When so signed and witnessed or acknowledged, such receipt shall be prima facie evidence of the genuineness of such signature."

(c) The original certificate of title is retained by the Registrar of Titles and forms part of the register of titles, but an owner's duplicate certificate of title is issued to the owner. Section 36 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 84) provides:

"The registrar shall, at the same time that he makes out his original certificate of title, make out an exact duplicate thereof, with the memorials and notations

thereunder noted, which shall be delivered to the owner and shall be known as the owner's duplicate."

(d) The owner's duplicate certificate of title must be surrendered upon a transfer. (Section 47.)

(e) Proofs as to the rights of the transferer and transferee must be made to the registrar at the time of transfer. Section 47 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 95) provides:

> "A registered owner of land desiring to transfer his whole estate or interest therein, or some distinct part or parcel thereof, or some undivided interest therein, or to grant out of his estate an estate for life or for a term of not less than ten years, may execute to the intended transferee a deed or instrument of conveyance in any form authorized by law for that purpose. *And upon filing such deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, and upon its being made to appear to the registrar that the transferer has the title or interest proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him,* he shall make out and register as hereinbefore provided a new certificate and also an owner's duplicate certifying the title to the estate or interest in the land desired to be conveyed to be in the transferee, and shall note upon the original and duplicate certificate the date of the transfer, the name of the transferee and the volume and folium in which the new certificate is registered, and shall stamp across the original and surrendered duplicate certificate the word 'canceled'."

(f) As a guarantee of the proper performance of his duties the Registrar of Titles in Cook County must file a $200,000 bond. Torrens Act, Section 2 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 50).

(g) If the Registrar of Titles is careless or negligent, or his deputies are careless or negligent, the Registrar of

Titles is liable on his $200,000 bond. Torrens Act, Section 6 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 54).

(h) But the Registrar of Titles is not alone bound by his bond. Behind him is the Circuit Court of Cook County. In the event of any wrongful act or omission upon the part of the Registrar of Titles, a petition may be filed in the Circuit Court of Cook County by the aggrieved party to control the action or omission to act of the Registrar of Titles. Section 93 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 134) provides:

> "Whenever any person interested in registered land, or any estate or interest therein, or charge upon the same, shall be entitled to have any certificate of title, memorial or other entry upon the register cancelled, removed or modified, and the registrar or person whose duty it shall be to cancel, remove or modify the same, shall upon request, fail or refuse to do so, or is absent from the county, or can not be found, or for any reason such request cannot be made upon him, or where under the provisions of this act the registrar has no power or authority to make a transfer until he shall have been directed so to do by an order of court, the Circuit Court of the county where the land is registered, may upon petition by the person interested, make such order as may be according to equity in the premises."
>
> "And in every proceeding in which a final decree shall have been entered directing the registration of any tract or parcel of land the court shall retain jurisdiction to enter any order which may be proper to give effect to the provisions of this section."

Section 94 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 135) provides:

> "Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter pertaining to the first registration of land, or any estate or interest therein, after the first registration of any transfer of or charge upon the same, the filing or neglect or refusal to file any instrument, or to enter or

cancel any memorial or notation, or to do any other thing required of him by this act, may file his petition in the circuit court in the proceeding in which the land was registered, making the registrar and other persons, whose interest may be affected, parties defendant, and the court may proceed therein to make such order or decree as shall be according (to) equity in the premises and the purport of this act. Nothing in this section contained shall bar such person from filing an original bill or petition in such cases in equity in any court of competent jurisdiction."

(i) Such petitions to control the action of the Registrar of Titles may be filed in the Circuit Court of Cook County without the payment of any fee, making recourse to the courts as easy as possible. Torrens Act, Section 107 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 148).

(j) Damages, including reasonable attorney's fee, may be recovered from the indemnity fund for unauthorized acts of the Registrar of Titles. Section 96 of the Torrens Act (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 137) provides:

"The court may in any case contemplated in sections 93 and 94, in addition to the costs, award such damages, including reasonable attorney's fees, as it shall deem just in the premises. The damages and costs so awarded shall be payable out of the indemnity fund created by sections 99 and 100 of this act, in the manner provided by section 102 of this act."

(k) An indemnity fund is created for the payment of damages arising out of wrongful acts of the Registrar. Torrens Act, Section 102 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 143).

(l) A right of action for such damages is given against the county. Torrens Act, Section 101 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 142).

(m) And finally, notwithstanding the right to file a petition in the original land registration case without fee is given, the right of filing an original bill or petition in equity

in any court of competent jurisdiction is preserved to any aggrieved party. Torrens Act, Section 94 (Cahill's Ill. Rev. St., 1929, Ch. 30, Sec. 135).

In view of the foregoing provisions of the Torrens Act of Illinois it is hardly conceivable how any additional safeguards could have been afforded than are already given. The means of knowledge through identifying facts, the handwriting of the owner preserved for comparison of signatures and the right of the registrar to demand proofs of the transferer and transferee make it possible and essential that the registrar shall complete a registration on the basis of knowledge rather than ignorance. The fact that the owner's duplicate certificate must be presented makes it possible for the owner himself to make forgery difficult. The neglect or carelessness of the Registrar is guarded against by his $200,000 bond. Recourse may not only be had to the Circuit Court on petition, but that petition may be filed without fee, and if properly filed, attorney's fee may be recovered. Means of payment of damages are provided through the indemnity fund and the right of action against the county, and the right to file a general bill in equity is expressly provided.

But it is said in appellants' brief that a perjured affidavit as to a lost certificate may make it possible for a forger to produce a new owner's duplicate certificate while the old certificate remains in the true owner's possession. The answer to this is twofold. First, it is the affidavit of the owner which is required under Section 58 as to a lost certificate, and the Registrar of Titles has the means and knowledge in his possession of knowing who the owner is and the signature to the affidavit. Second, in thirty-one years' experience in the Torrens office, it has never been successfully accomplished. Such suppositious cases sound well on paper, but mean nothing in actual practice.

The Registrar of Titles respectfully submits that a law which has proved itself in the matter of protection from forgeries for a period of thirty-one years with an unbroken record as to the adequacy of its safeguard against forgery, ought not to be held unconstitutional as not due process of law on the basis of theories which have never materialized into actual facts.

XV.

Any loss which may have occurred has been due to appellants' own acts.

In closing its opinion, the Supreme Court of Illinois in this case summarized the whole case in a few words when it said:

> "The statute is not unconstitutional because it deprived appellants of the title to their property without due process of law. It makes ample provision for the protection of all persons interested. Appellants lost their property by reason of their failure to safeguard their interests and not by reason of any defect in the statute."

On page 33 of appellants' brief they emphasized the fact that they have a constitutional right to retain the property "in specie." Their argument is evidently made for the sole purpose of finding a pretext to have this honorable court declare the Illinois Torrens Act unconstitutional, and not from any real desire to retain the property in kind.

Prior to the events complained of in their petition, they had already agreed to sell and convey the property to George B. Kennedy and Pearl A. Kennedy, his wife, on April 1, 1926. They were also to place a mortgage of $27,000 which was to be assumed by the purchaser. The total sale price was $6,750 of which $1,000 was paid down, $2,700 assumed by the mortgage and $3,050 was to be paid at the

rate of $60 per month. So little did they want the premises that in May, 1926, one month later, they were negotiating with Napletone to discount the balance of $3,050, and in their petition they allege "that in the course of the negotiations looking toward such sale, your petitioners entrusted to the said Napletone a duplicate original of said contract of sale and also the certificate No. 113893 evidencing the title of your petitioners in and to said premises."

A deed from petitioners to Napletone was presented to the Registrar of Titles on May 19, 1926 and registered as Document No. 303637 and certificate of title No. 167919 was issued to him by the Registrar of Titles. The petition also alleges (transcript of record page 2) "that thereafter from about May 18, 1926, until June 18, 1926, your petitioners were constantly endeavoring to obtain from Napletone either the amount which he had agreed to pay for said premises and said assignment of contract, or to obtain back from him the said certificate of title and duplicate original contract which had been entrusted to him, but without avail."

In other words, they wanted back either the certificate of title and the duplicate original contract or the amount of money from Napletone *which he had agreed to pay.* There thus is disclosed the existence of a definite agreement with Napleton for a definite price which he had agreed to pay, but did not pay. Their demand was not for an absolute return of the certificate of title and duplicate original contract, but was in the alternative for either the payment of the price agreed upon or the return of those documents.

Not only was there an agreement with Napletone but also there was an attornment by the contract purchasers, the Kennedys, to Napletone. That fact is left to be inferred from the petition. The petition avers that shortly after the execution of their contract on April 1, 1926, the Kennedys went into possession of the premises and have remained in

possession and paid the petitioners "up to the happening of the events hereinafter set forth" all payments required in and by said contract (transcript of record page 2). The "events hereinafter set forth" are immediately followed by a recitation of the Napletone deal, and in the prayer of the petition the defendants are asked "to account to your petitioners for any sum or sums paid to them by the purchasers under said contract." So it is not a violent assumption to believe that the Kennedys attorned and made payments under the contract to Napletone and to the Wilborns who purchased from Napletone.

So from May 18, 1926, until June 18, 1926, *the situation is that the owner's duplicate certificate of title is in the hands of Napletone, the duplicate original contract of sale to the Kennedys is in the hands of Napletone, the Kennedys are in actual possession of the property, and the Kennedys are making payments on that contract to Napletone and the Wilborns.* The details of the contract or agreement between the petitioners and Napletone do not appear in the petition. Evidently it provided for deferred payments or a sale on credit insofar as Napletone was concerned. The equitable, if not the legal title, passed to Napletone from the petitioners by the delivery of the duplicate original contract of purchase and the certificate of title to Napletone. *Odom* v. *Riddick,* 104 N. Car. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686. A delivery of such a contract, without written assignment, may be sufficient under the Illinois law to authorize a deed. *Snapp* v. *Peirce,* 24 Ill. 156. See also *Robinson* v. *Williams,* 40 Tenn. 540.

Without possession of the owner's duplicate certificate of title, Napletone could not have secured under any circumstances a certificate of title in his own name. Knowing this full well, and although "constantly endeavoring" to have Napletone either pay the price or return the documents, the

petitioners, who should have been put on their guard by Napletone's failure to do either allowed a full month to go by and on June 19, 1926, found that Napletone had fled.

Petitioners also aver that they protested to the Registrar of Titles against the Registrar of Titles issuing his certificate to the Wilborns who were grantees of Napletone, "but the said Registrar of Titles nevertheless on May 29, 1926, issued his certain certificate of title to the said Charles Wilborn and Carrie S. Wilborn, his wife, being certificate No. 175048." (Transcript of regard page 4.) Yet even after May 29, 1926, and up to June 18, 1926, (Transcript of record page 2) petitioners were still negotiating with Napletone and continued to do so until he fled on June 19, 1926. This petition claiming forgery was filed July 30, 1926, (Transcript of record page 1), but the Registrar of Titles whose action it was supposed to control was never served as a defendant. From the averments of the petition itself it appears that for three weeks after the issuance of the certificate of title to the Wilborns, *and necessarily for at least that time after the petitioners had full knowledge of Napletone's acts,* petitioners were still demanding from Napletone the cash which he had agreed to pay. Not until Napletone had fled did the petitioners try to shift the loss to the Wilborns, the innocent purchasers, and to the Registrar of Titles.

Attention is also called to the fact that Napletone turned over to the Wilborns the duplicate original contract with the Kennedys which admittedly bore petitioners' genuine signatures. If the deed to Napletone had forged signatures of the petitioners, and the signatures to the assignment on the back of the Kennedy contract were also forged, while the signatures on the face of the contract were genuine, the forged signatures must have been fairly good to permit Napletone to pass over a document with a genuine signature on the front and a forged signature on the back.

It must also be remembered that the Registrar of Titles had the petitioners' genuine signatures on file for comparison, and there is no allegation in the petition that the Registrar of Titles did not compare the alleged forged signatures with the genuine signatures in his possession, or that the signatures on file with the Registrar of Titles were not made by the same persons as those who signed the alleged forged instruments.

But assuming that, notwithstanding the precautions taken under the act as to genuine signatures and as to proof of the right of the transferer to make the transfer, the signature on the deed from the petitioners to Napletone was a forgery, the forgery could never have been carried through without the act of the petitioners in turning over their certificate of title to Napletone. The Registrar of Titles may have acted under an honest mistake as to the genuiness of the signature on the deed from the petitioners to Napletone, and no fraud on the part of the Registrar of Titles is claimed in the petition, yet the act of the Registrar of Titles could only be charged to mistake and not to fraud on his part and admittedly could not have been done without the petitioners having handed over their certificate of title to Napletone.

In this connection the words of Lord Hatherley in *Vickers* v. *Hertz*, L. R. 2. H. H. (Sc.) 113, are peculiarly applicable:

> "When * * * one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it."

This doctrine has been applied and upheld in land registration cases where the certificate of title with other indicia of title have been delivered to persons who have used them with resulting loss.

Barry v. *Heider*, 19 Commonwealth Law Reports 197.

Great West Permanent Loan Co. v. *Friesen*, 4 D. L. R. (1924) 980.

The Supreme Court of Illinois truly said that appellants lost by reason of their failure to safeguard their interests and not by reason of any defect in the statute.

XVI.

The denial of petitioners' claim by the Illinois State courts does not deprive petitioners of property without due process of law.

The petition filed in this case and which is now before this honorable court for review was filed under sections 93 and 94 of the Torrents Act without fee, being one of the safeguards which the Torrens Act has provided for owners against wrongful acts of the Registrar. The petition was not filed until after Napletone had fled, although the petitioners were aware of the facts which had transpired prior to the actual issuance of the certificate of title to the Wilborns by the Registrar of Titles. By this proceeding they attempted to lock the door of the stable after the horse had fled.

Although claiming that they now desire the property, where they have been doing their utmost to get the cash, petitioners bolstered up this claim with another that the law was unconstitutional in a special proceeding brought under the Torrens Act itself. In that proceeding their own acts were placed in issue by their own pleadings. Both the Circuit Court and the Supreme Court placed a construction on petitioners' acts which was adverse to petitioners. Having had an adverse decision in that respect petitioners are in no position to claim that they have not had due process of law even if it were granted that the decision of this court might have been different on the same set of facts.

In *Bonner* v. *Gorman*, 213 U. S. 86, 29 Sup. Ct. 483, 53 L. Ed. 709, the Supreme Court of the United States said:

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings on erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States, *Central Land Company* v. *Laidley*, 159 U. S. 103, 112."

In *Tracy* v. *Ginzberg*, 205 U. S. 170, 27 Sup. Ct. 461, 51 L. Ed. 755, the Supreme Court of the United States said:

"The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the constitution, and by re on of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of. The Fourteenth Amendment did not impair the authority of the States, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitution, or by any valid act of Congress, or by any treaty."

In *Davidson* v. *New Orleans*, 96 U. S. 97, the Supreme Court of the United States said:

"But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

So also it has been said:

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."

Central Land Company v. *Laidley*, 159 U. S. 103.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575.

Any other view of the law would mean that every act of every Registrar of Titles in every one of the eighteen states and territories which have Torrens Acts could be brought to the United States Supreme Court for review—a result not to be thought of.

XVII.

A genuine deed signed by the holder of a genuine certificate of title will pass good title to a bona fide purchaser, even though the prior certificate of title was based on a forged deed.

There are a number of cases on forged deeds under the Torrens system in the English Colonies which ought to be controlling in Illinois unless there is some constitutional inhibition against it. The result of those cases may be summarized as follows:

(a) Where the holder of a certificate of title obtains his certificate by reason of a forged deed in which he appears as the grantee, the register is not conclusive because the certificate holder must look to the genuiness of the deed under which he claims. (*Gibbs* v. *Messer* (1891) A. C. 248.)

(b) Everyone who purchases, bona fide and for value, from the improperly registered owner whose deed was a forgery, and becomes the registered owner himself, acquires

an indefeasible right, notwithstanding the infirmity of his grantor's title. (*Brown* v. *Broughton*, 31 Western Law Reporter, (Manitoba) 583.)

The judgment in *Gibbs* v. *Messer*, at p. 255, seems to make the reason for this distinction clear. It says:

> "The protection which the statute gives to persons transacting on the faith of the register is by its terms limited to those who actually deal with and derive rights from a proprietor whose name is upon the register. Those who deal not with the registered proprietor but with a forger, and who use his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith for onerous consideration."

In the case of *Kateneth Whakaruru and others* v. *The Public Trustee and others*, 12 New Zealand Law Reports 651, which like the case of *Gibbs* v. *Messer* (1891) A. C. 248, was decided prior to the enactment of the Illinois Act, and which our legislature must be presumed to have had in view it is said:

> "Where a purchaser does not deal directly with the registered owner it may well be that he is bound to see not only that the instrument which he presents for registration is genuine, but also that it is executed by some person duly empowered to act on behalf of, or in the place of, the registered owner. Security of title and facility of transfer are two purposes not entirely consistent, and the policy of the Land Transfer Act is to some extent a compromise between them. Still, it is obvious that the former must be in general paramount. It would be an invitation to carelessness and a temptation to fraud if persons presenting instruments for registration were allowed to be indifferent respecting their validity as conveyances by, or on behalf of, the true owner. The Act, whilst it does away with the necessity of a retroactive investigation of title, does not enable persons seeking registration to throw upon the

Registrar the whole responsibility of ascertaining that (to use the language of conveyances) the proper conveying parties have executed."

"But the case of a bona fide transferee from a person placed on the register under a void or voidable instrument does undoubtedly constitute a special case of exception, in which the security of the true owner in his holding is sacrificed to the object of facilitating transfer."

In the latter case, where a bona fide transferee takes a valid title from a registered owner whose registration was based on a forged deed, the cases hold that the remedy of the true owner is against the indemnity fund provided by statute.

In the eighteen states and territories in which there are Torrens Acts, it is undoubtedly true that there is not a single one in which it would not be held that while a certificate of title remains in the name of a party whose certificate was issued directly on a forged deed such certificate of title could and would be set aside. This is on the assumption that fraud vitiates everything as to the party claiming thereunder who is a party thereto and he cannot reap the benefits thereof. The exception of fraud as to parties participating therein would be read into a Torrens Act even though it is not expressly excepted by the act itself.

But it is equally true that the law has always protected a bona fide purchaser, and it is within the power of the legislature to give such protection. This is not only true under the Torrens laws but also under the old recording laws. Thus under the recording laws title may be passed by delivery of a deed without recording, and yet a statute may be good which will require that the deed be recorded to be good as against bona fide purchasers or creditors without notice. If the legislature has no power to protect purchasers in good faith and for a valuable consideration

who rely on a genuine deed and a genuine certificate of title then it would have to be held that the legislature would have no power under a Torrens law to protect against claims of parties under disability who may have had title while under disability and whose disability was unknown at the time. Yet it has never been claimed that the legislature of a state has no power to protect purchasers in good faith and for value against unknown and undisclosed claims. That power of the legislature is inherent in the very nature of government itself, and this phase of the Torrens law is no different from similar phases of the recording acts.

XVIII.

Appellants are bound by provisions of the Torrens Act.

In the statement of matter and grounds making against the jurisdiction asserted by appellants, heretofore filed in this cause by the Registrar of Titles, on pages 15 to 23 inclusive, the Registrar of Titles has cited a number of cases to show that appellants are bound by the provisions of the Torrens Act of Illinois through their own acts and the acts of their predecessors in title. No attempt has been made in the brief of the appellants to differentiate these cases, except to assume that they are not in point because appellants cannot bind themselves in advance by an agreement, which may be specifically enforced, to forfeit their rights at all times and on all occasions, whenever the case may be presented. (Appellants' Brief p. 345.)

It will be noticed that on page 15 of statement of matter and grounds making against the jurisdiction asserted by appellants, the heading is "Appellants bound by provisions of Torrens Act." The word "waiver" is not used in the argument by the Registrar of Titles. It is used in a few cases cited, but not in the sense claimed by appellants. The

Registrar of Titles respectfully points out that when appellants acquired title to the property in question, they did not *waive* any rights. They *acquired* the rights given them under the Torrens Act, and with those rights came any conditions annexed thereto by the legislature. "*Acquisition*" of rights is quite different from "*waiver*" of rights. At no time while appellants held title to the property was the property under the recording system. At all times it was under the Torrens System. At no time while the appellants held title was the execution and delivery of a deed the operative act for passing title. At all times the operative act for passing title was the act of registration by the Registrar of Titles. Appellants were waiving no rights under the recording system because they had no rights under the recording system. Their only rights were under the Torrens System and those rights from the minute of acquisition were coupled with the conditions annexed thereto by the legislature for holding, enjoying and ending them.

The situation in this case is largely analogous to that where a State passes title by a tax deed and couples with it the right of redemption on the payment of the amount due. In such case the Supreme Court of the United States has said (*Rusch* v. *John Duncan Co.*, 211 U. S. 526, 53 L. Ed. 312, 29 Sup. Ct. Rep. 172):

> "If the title was taken subject to redemption it cannot be said to be divested without due process of law if redemption was exercised according to law. And how redemption should be exercised and how it could be cut off depended upon the provisions of the statute and, therefore, the best answer to the assumption of plaintiff in error, that he acquired an indefeasible title, is the answer given by the Supreme Court of the State, whose province it is to pronounce the meaning of the statutes of the State without question by this court. The court said: 'The deeds which the defendant received from the State are expressly made subject to

the relevant conditions imposed by Act No. 229, Public Acts of 1897, as amended. Whatever the title which the State held, it sold to defendant (plaintiff in error) an interest in the lands which was liable to be divested.'"

The Registrar of Titles again repeats that in assuming the benefits or burdens of the Torrens Act, a purchaser assumes exactly the same benefits and burdens as everyone else in like position. Everyone is treated alike within the classification. The statute makes no discrimination and imposes no unequal condition. Removal cases cited by appellants are not in point because in all of them it was sought to force inequality of rights on those in the same line of business.

On March 24, 1797, the Legislature of New York passed an act, entitled, "An Act to settle disputes concerning the title to lands in the County of Onondaga." On a question of priority between two deeds, the Supreme Court of the United States said:

"There is no contract on the part of the state, that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered. It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions of them, and the acts from which the time limited

shall begin to run, will generally depend on the sound discretion of the Legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one."

Jackson v. *Lamphere*, 28 U. S. (3 Peters) 280.

XIX.

Appellants' remedy is against the Indemnity Fund.

In the statement of matter and grounds making against the jurisdiction asserted by appellants (pages 24-28), it has been pointed out that appellants' remedy is against the indemnity fund. If recourse had been had to the indemnity fund, appellants whose every act in first selling the property and then attempting to discount the balance due showed a desire to obtain the cash rather than the property, if a forgery was in fact committed, would have long ago received from the indemnity fund the amount of their loss. They chose instead to come to this court on a claim of the unconstitutionality of the act, and if the case was reversed by this Court, they would first have to prove the forgery and then would only be entitled to receive the cash balance on their contract and not the property itself. It would seem that if this case had been brought in good faith, and a forgery proved, and the Registrar of Titles made a party defendant, the money from the indemnity fund would have been equally acceptable to appellants as the same amount of money from the contract purchasers.

It is also claimed in appellants' brief that the issuance of the certificate to the Wilborn's by the Registrar of Titles is a "taking" of property for private purposes without compensation. As stated in *White* v. *Ainsworth*, 62 Colo.

513, 163 Pac. 959, Ann. Cas. 1918 E. 179, what is intended as a safeguard or protection to that extent in favor of anyone who might by chance be injured without other remedy by reason of the provisions of the act, cannot be classed as a "taking" of property for private purposes.

As to the claim of appellants that the money in the indemnity fund is not used for a public purpose, the answer is apparent on its face.

The money in the indemnity fund does not come from public sources. It comes from people dealing with the land or putting land into the Torrens system. But even if it came from public treasury, it would be for a public purpose and well within the rights of the legislature. In *American Land Co.* v. *Zeiss*, 219 U. S. 47, 55 L. Ed. 82, Sup. Ct. Rep. 200, the Supreme Court of the United States at page 60 of the official reports said:

> "As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government."

If the Torrens Act is not for a public purpose, then there is not a recording act in the United States which is for a public purpose, and it would be impossible for any public money to be used in the payment of the expenses of a recorder's office. The mere statement of such a proposition carries its own refutation.

CONCLUSION.

Approximately about twenty per cent of the property in Cook County, Illinois, is registered under the Torrens System. A great bulk of this registration has come during the last twelve years. Under the reassessment now going on in Chicago the assessed valuation of real property in Cook

County will amount to over twelve billion dollars. The amount of Torrens property is valued well over a billion dollars.

This growth of registered property in Cook County has been due to satisfied owners telling others. The Torrens Office has not one penny appropriation for advertising. Neither does it pay commissions to real estate brokers and lawyers for business transacted. Yet it has grown to amazing proportions because it is the peoples' own method of dealing with real estate titles.

Because transactions can be made on the faith of the Register of Titles at a cost of $3.00 for each transaction, no matter what the value of the property may be, the delays and expense incident to the old recording system are done away with. No man can estimate the amount of money which has been saved to the people of Cook County by reason of this fact.

In speed and facility of transfer, and in simplicity, and low cost, and in adaptability to modern business conditions, the Torrens System of land title registration in Cook County has proved itself.

Its history has been one of service to the people. The adequacy of its provisions has been shown by experience. In thirty-one years of actual practice with literally billions of dollars in values handled during that period, the total losses sustained have been less than nine thousand dollars, and these have been paid out of the indemnity fund. The interest each year on the indemnity fund is more than sufficient to pay the total losses for the entire thirty-one years.

That such a system should be jeopardized by theoretical conclusions advanced in a case argued on demurrer by private individuals whose own actions show an absolute disregard for the safeguards erected by the Torrens Act it-

self would ordinarily seem incredible and monstrous. Yet this case has been advertised widely as an attempt to break down the Torrens System of land title registration by killing its theory of protection of the purchaser for value and in good faith on the strength of the certificate issued by the Registrar of Titles.

The Supreme Court of Illinois expressly said in its opinion that it was the appellants' own acts and not the Torrens law which has occasioned loss. In this the Registrar of Titles fully agrees. The Supreme Court of Illinois has passed upon the effect of those acts of appellants. The effect of those acts with reference to title to land is exclusively a matter of State jurisdiction. The Registrar of Titles therefore respectfully suggests that no federal question is involved, and the appeal of appellants should be dismissed.

Respectfully submitted,

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Registrar of Titles of Cook County, Illinois.

By J. SCOTT MATTHEWS,
His Attorney and Counsel.